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CRIMINOLOGY

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CRIMINOLOGY

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BY

MAURICE PARMELEE, PH.D.

AUTHOR OF "THE SCIENCE OF HUMAN BEHAVIOR," "POVERTY AND SOCIAL PROGRESS," "THE PRINCIPLES OF ANTHROPOLOGY AND SOCIOLOGY IN THEIR RELATIONS TO CRIMINAL PROCEDURE," ETC.

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PREFACE

A DECADE has passed since my book on the applications of criminology to criminal law and procedure was published. It grew out of several years of experience with criminals in courts and prisons in this country, and criminological research in Europe. At that time it was my intention to follow that book with a similar one on the applications of criminology to penal treatment.

Since then the biological, psychological, and social sciences upon which criminology is based have advanced rapidly, and much work has been done within the criminological field itself. Hence much of the criminology of a decade or more ago is already obsolete. I have, therefore, abandoned my original plan, and, having commenced at the beginning of the subject, have attempted a comprehensive survey of the whole field of criminology.

Much of the criminological writing heretofore has been more or less unilateral in its character. This has been due almost always to one-sided knowledge, sometimes also to prejudices and preconceived notions. For example, some writers have claimed that crime is due entirely to social causes, others have asserted that it is due entirely or almost entirely to the traits of the criminal himself.

There is now available a much larger fund of knowledge from which to construct a criminological theory and to devize a practical program. Consequently there is no longer any excuse for unilateral theories of crime. It is obvious that crime cannot be attributed to any one group of causes. Furthermore, it is manifestly impossible to measure precisely the extent to which any one factor gives rise to crime. Criminological theory today is more cautious and catholic, and does less violence to the facts. It is, therefore, more accurate though less pretentious than some of the older criminology.

The present work is a companion volume to my *Poverty and Social Progress*. In these two books I have attempted to describe

the two greatest of social evils, namely, poverty and crime. The present work will, I hope, prove to be useful to many of those interested in and working with the problem of crime, and as a textbook for college and university courses in criminology.

I wish to thank my brother, Dr. J. H. Parmelee of the Bureau of Railway Economics, Washington, for reading all of the manuscript and making many helpful suggestions. I wish also to thank Dr. Joseph A. Hill, Chief of the Division of Revision and Results of the United States Bureau of the Census, Washington, for enabling me to inspect some of the proof sheets of the Bureau's report on Prisoners and Juvenile Delinquents.

MAURICE PARMELEE.

NEW YORK CITY,
January, 1918.

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PART I

NATURE AND EVOLUTION OF CRIME

CRIMINOLOGY

CHAPTER I

THE STUDY OF CRIMINOLOGY

Application of science to the study of crime — Criminology a hybrid science — The sciences used in criminological research — The principal branches of criminology — Sociological significance of the study of crime.

FEW subjects arouse so universal or so deep an interest as the study of crime. This interest is due in the main to the adventurous and romantic traits in human nature. Criminal conduct appeals to these human traits because it is regarded as being a spontaneous response to impulse, and even the most prosaic and conventional individual chafes to a certain extent under the restrictions of law and morality. If this interest is not so great as to become morbid, it may have great utility, because crime is both a serious practical problem and an important subject for scientific study.

During the past century the extent to which scientific methods have been applied to the study of human and social phenomena has increased greatly. To be sure, there still is much opposition to the scientific study of these phenomena. Some of this opposition arises from anthropocentric notions with regard to the exalted position of man in the universe. Some of it arises from anti-scientific theological dogmas. Some of it is due to propagandists who are eager to push through certain social reforms, and are therefore unwilling to await the results of careful and cautious scientific investigation. All of this opposition creates a prejudice against attributing human conduct to natural causes. But slowly this opposition is being overcome, and crime will before long be regarded as a purely natural phenomenon.

Special attention has been devoted to the study of crime and the criminal since the remote past. The early pseudo-sciences of physiognomy and phrenology attempted to describe the traits of the criminal. At the present time many sciences are contributing to this study. From the laboratories of these sciences, from the researches of scientific workers, from statistical investigations of various kinds are to be derived the facts for the study of crime and the criminal. These facts are not adequate as yet for a final synthesis, but they nevertheless have great scientific and practical value.

Criminology is not one of the fundamental sciences, but is a hybrid product of several sciences. Zoölogy, anthropology, history, and sociology contribute to the description of the nature, origin, and evolution of crime. Meteorology, demography, and the special social sciences, such as economics, politics, etc., contribute to the analysis of the environmental causes of crime. Anatomy, physiology, psychology, and psychiatry furnish the facts and methods for the study of the traits and types of criminals. Comparative jurisprudence and law contribute to the study of the penal treatment of crime and the criminal.

Consequently, many scientific methods are applied in criminological research. *Zoölogical*, *anthropological*, and *historical* methods are used in tracing the evolution of crime from its prototypes among animals to the forms it takes in civilized society.

Meteorological methods are utilized in studying the influence of the weather, climate, season, topography, and other telluric forces upon criminal conduct. These factors of the external physical environment are of fundamental importance in any study of conduct. *Demographic* methods are used in studying the influence of the density and distribution of the population, of the increase or decrease of population, and of migrations of population.

The *sociological* method involves a study of the numerous social factors which cause criminal conduct and play a part in making criminals and criminal types. Among these factors are the economic, political, religious, moral, and artistic factors. Closely connected with the sociological method is the *statistical* method, because it is frequently used in sociological investigation. But the statistical method may be used to aid any of the

other methods, so that it must be regarded as ancillary to all of these methods.

The *anatomical* method brings to light abnormalities and malformations of the external structure of the organism which in some cases are of significance with respect to criminal conduct. It reveals defects and derangements of the internal organs which frequently have a far-reaching influence for evil upon conduct. It describes the structure of the nervous system, a knowledge of which is absolutely necessary for the study of mental traits.

The *physiological* method studies the organic processes in the viscera and elsewhere in the body, and brings to light functional derangements which frequently have an injurious effect upon conduct. The *clinico-pathological* method makes possible an intensive study of the defective, abnormal, and deranged conditions revealed by the anatomical and physiological methods.

The *psychological* method, supported by the anatomical, physiological, and clinico-pathological methods, studies the mental traits and processes in order to ascertain in what mental states, whether normal or abnormal, criminal acts are committed. This method is very helpful in devizing a classification of criminal types, because criminal conduct, like all forms of conduct, is determined primarily by these mental states. Inasmuch as many of the mental states which give rise to criminal conduct are abnormal, psychiatry plays an important part in the application of the psychological method.

In this book we are to make a more or less comprehensive survey of criminology. The topics to be treated in the succeeding chapters may be classified under the following heads, which indicate the principal branches of criminological science: —

1. Theory of the nature and evolution of crime.
2. Criminal sociology.
3. Criminal anthropology.
4. Criminal psychology.
5. Criminal jurisprudence.
6. Penology.

The study of crime has great sociological significance. It furnishes one of the most striking illustrations of the relation between the individual and society, and the conflict between individual and social interests. The penal treatment of the criminal is the most drastic form of social repression, and

criminology is fundamentally a study of social control. Hence it is that criminology and ethics are closely related, and the study of crime involves the discussion of numerous ethical problems of great social importance and scientific interest.

Crime is ordinarily regarded as a pathological and abnormal form of conduct. The study of the abnormal is always of significance not only for its own sake, but also because of the light it throws upon the normal as well. It is impossible to recognize and understand fully the normal until the abnormal variations have been studied. So that the study of criminal conduct is instructive with respect to normal human conduct. It is frequently difficult to ascertain what is normal conduct, and in dealing with this problem I shall apply biological, psychological, social, and ethical norms.

CHAPTER II

THE ORIGIN AND EARLY EVOLUTION OF CRIME

Equivalents of crime and punishment among animals — The limits of the analogy between man and the animal world — Alleged equivalents of crime among plants — Juridical punishment of animals by men — The beginnings of crime among men — Origin of crime in violations of custom — Influence of magic and religion upon the evolution of crime — Influence of moral ideas upon the evolution of crime — The earliest crimes: treason, witchcraft, sacrilege, incest, poisoning, violations of the hunting rules.

THE equivalents or analogues of crime are to be found among animals other than man. Some criminologists, indeed, have sought for these equivalents in the plant world as well. The search for equivalents of crime outside of the human world is justified. Crime is a natural phenomenon, and is, therefore, closely related to other natural phenomena. In accordance with the theory of evolution we are constrained to believe that it has evolved out of other phenomena, and must seek its origin in these other phenomena.

EQUIVALENTS OF CRIME AND PUNISHMENT AMONG ANIMALS

The mammals and birds share many of the instincts and feelings possessed by man. The same is true to a less degree of the remainder of the vertebrates; while some of the invertebrates, such as the insects, probably possess at least a few of these instincts, and possibly a few of these feelings, though the last surmise is doubtful. Just as in man the social instincts and feelings, partly under the direction of the intellect, have given rise to human society, in similar fashion the corresponding instincts and feelings have given rise to a social manner of life among many of these animal species. In each of these animal societies habits and customs arise which in the long run aid the survival of the species. Consequently, acts which are contrary to these habits and customs will usually be injurious to the

species, and will be reacted against by the members of the species.

Many such acts and the reactions against them have been observed among animals. Animals have been known to kill, to steal, to maltreat each other, and in many other ways to injure their congeners and their species. Furthermore, such acts have been traced to abnormal traits of the offenders which have apparently caused them. Just as in man aberrations of the instinctive, affective, and intellectual traits and the physical abnormalities which underlie these aberrations frequently lead to anti-social conduct; in similar fashion like aberrations and abnormalities lead to corresponding conduct on the part of animals. Many cases have been described where malformation of the brain, abnormalities of the viscera, nervous disorders, etc., have given rise to aberrant conduct.[1]

Equivalents of punishment also are found among animals. When acts contrary to the habits and customs of the species are committed, members of the species have in many cases been observed to display anger and the desire to revenge which have led them to inflict pain upon the offending individual, and to drive the offender away from the group, or even to kill the offender.

I have not the space to describe in detail these equivalents or analogues of crime and of punishment among animals. But while this analogy is very significant, and should therefore be

[1] Lacassagne has classified the causes of aberrant conduct among animals according to the traits whose aberrations give rise to such conduct. He says that they are due to aberrations of (1) the nutritive instinct, (2) the sexual instinct, (3) maternal love, (4) the destructive instinct, (5) the instinct of vanity, (6) the social instincts. (A. Lacassagne, *De la criminalité chez les animaux*, in the *Revue scientifique*, Vol. III, No. 2, Jan. 14, 1882, pp. 34–42.)

To quote his own words, aberrant conduct among animals is due to "the exaggeration of these instincts, exaggerations which are harmful to other animals of the same species, which manifest themselves by special kinds of acts which are called offenses or crimes in human societies." Such conduct is due sometimes to exaggerations of some of these traits, but in other cases is due to the excessive weakness of the same or of other traits. It may be questioned whether some of the instincts mentioned by Lacassagne actually exist, as, for example, the destructive instinct and the instinct of vanity. However, his classification gives some idea of the kinds of aberrations which give rise to these equivalents of crime among animals.

pointed out in any study of crime, it is important that the analogy should not be carried too far, as has been done by some writers. There are differences between man and the animal world which place limitations upon the analogy.

To begin with, public opinion and moral ideas are not to be found among animals, or if found at all only in a most rudimentary form; whereas these phenomena are fully developed among men, and play an important part in determining the character of crime. Neither public opinion nor moral ideas can exist without a well-developed means of communication such as speech, and man is the only animal which possesses the faculty of speech. In the second place, no animal other than man possesses religious beliefs or magical ideas, and both of these have had much influence upon crime in human social evolution. In the third place, no animal other than man has developed the state, government, and law, and these political institutions largely determine the nature of crime in the higher stages of social evolution.

Because of these differences there can be no strict analogy between "crime" among animals and crime among men. And yet some writers have tried to draw such a strict analogy. For example, one writer asserts that courts of justice and criminal procedure are to be found among animals: — "The instances recorded of animals holding courts of justice and laying penalties upon offenders are too numerous and well authenticated to admit of any doubt. This kind of criminal procedure has been observed particularly among rooks, ravens, storks, flamingoes, martins, sparrows, and occasionally among some gregarious quadrupeds. It is as clearly established as human testimony can establish anything that these creatures have a lively sense of what is lawful or allowable in the conduct of the individual, so far as it may affect the character of the flock or herd, and are quick to resent and punish any act of a single member that may disgrace or injure the community to which he belongs." [1] This writer is interpreting in altogether too anthropomorphic a fashion the assemblies of gregarious birds at some of which offenders are punished spontaneously, but without the formal action of law and justice.

[1] E. P. Evans, *Evolutional Ethics and Animal Psychology*, New York, 1898, p. 230.

Some writers have gone so far as to extend the concept of crime even to the plant world. For example, Lombroso considered the habits of insectivorous plants as equivalents of crime in the plant world.[1] But this is manifestly an erroneous interpretation. In the first place, the differences between the traits of plants and of animals are so great as to stretch the analogy altogether too far. There is little if any reason to think that plants have either instincts, or feelings, or intelligence. Such being the case we can hardly speak of the "behavior" of plants in any sense which is at all comparable with the behavior of animals. In the second place, it is hardly possible to introduce the idea of crime with respect to the actions of one species upon another species, especially when the two species belong to entirely different realms of the organic world. So that the so-called "murders" of insects by insectivorous plants mentioned by Lombroso are "crimes" much less than the killing of animals by man for food or for amusement.

Juridical Punishment of Animals by Men

I have now stated the only scientific sense in which crime or the analogue of crime can be said to exist outside of mankind. But a popular notion of the criminality of animals has been prevalent in the past and still exists today, which should be noted in passing. This belief is that animals are morally responsible for their acts, and that consequently when an animal does injury to human beings it should be punished in much the same way as if it were a human being. As a result of this belief, during the Middle Ages and earlier many animals were tried and convicted for alleged crimes against human beings.[2] Various penalties were inflicted, the most frequent one perhaps being capital punishment. Curiously enough, this notion was sometimes extended to the plant world as well, so that plants also were held morally responsible for their alleged acts towards man. For example, Jesus Christ was apparently laboring under this

[1] C. Lombroso, *L'homme criminel*, Paris, 1895, Vol. I, Chap. 1.

[2] For an account of many such cases see, E. P. Evans, *The Criminal Prosecution and Capital Punishment of Animals*, London, 1906. See also, E. Westermarck, *The Origin and Development of the Moral Ideas*, London, 1906, Vol. I, Chap. 10.

delusion when he cursed the fruitless fig tree of Bethany for not furnishing food to mankind.[1]

Several things should be noted with respect to this notion. In the first place, it is evident that this belief arises out of an anthropomorphic interpretation of the animal and plant worlds. Man has assumed that animals and even plants think, and feel, and will like himself, and that therefore their acts should be treated like the acts of human beings. In the second place, in most if not all of these cases the animals were punished for their offenses against men. In fact, I do not know of a single case where an animal was punished by judicial process for an offense committed against a congener or a member of any other non-human species. While this may have been desirable from the human point of view, it was hardly fair to these animals. Man does not hesitate to kill animals in order to secure food, and for other human purposes. Furthermore, the great majority of human crimes are offenses committed against human beings, and the number of offenses against animals recognized by the law are very few. So that the scales of human justice have been heavily overweighted in the interest of human welfare in man's attempts to hold animals morally and penally responsible for their acts.

In the last place, a distinction should be noted between two kinds of judicial processes against animals. The first kind of process is the one I have so far been describing, namely, the trial and condemnation of individual animals for offenses which

[1] Some of the Christian apologists have interpreted this tale as indicating that Jesus regarded the tree as morally responsible, and therefore guilty of a delinquency. The accounts given of this alleged occurrence in the gospels of Matthew and of Mark suggest that Jesus uttered his curse in an access of pettish rage because he was deprived of his breakfast when hungry. "Now in the morning as he returned into the city, he hungered. And when he saw a fig tree in the way, he came to it, and found nothing thereon, but leaves only, and said unto it, Let no fruit grow on thee henceforward for ever. And presently the fig tree withered away." (S. Matthew, XXI, 18, 19.) "And on the morrow, when they were come from Bethany, he was hungry: And seeing a fig tree afar off having leaves, he came, if haply he might find any thing thereon: and when he came to it, he found nothing but leaves; for the time of figs was not yet. And Jesus answered and said unto it, No man eat fruit of thee hereafter for ever." (S. Mark, XI, 12–14.) This is like the child or savage who trips over a stone, and then strikes it in anger because it has hurt him.

they have committed against human beings. In these cases the guilty animals are apprehended and the penalties are inflicted directly upon them. In the second kind of process a whole species which is doing injury to mankind, such as predatory carnivores, thieving birds, noxious insects, etc., is tried, and if condemned measures are taken against it which may be regarded either as protective or as punitive, or possibly as both. At first these measures were probably magical practises directed towards destroying or driving away the offending species. Later these measures became religious in their character in the form of anathemas and curses uttered against the offending animals. In this kind of judicial process it is possible to inflict the penalties prescribed directly upon the culprits in very few if any of the cases, so that the efficacy of the magical and religious measures have to be relied upon to attain this end.[1]

[1] *Cf.* Karl von Amira, *Thierstrafen und Thierprocesse*, Innsbruck, 1891. The following statement by Evans is of interest in this connection:

"Von Amira draws a sharp line of technical distinction between Thierstrafen and Thierprocesse; the former were capital punishments inflicted by secular tribunals upon pigs, cows, horses, and other domestic animals as a penalty for homicide; the latter were judicial proceedings instituted by ecclesiastical courts against rats, mice, locusts, weevils, and other vermin in order to prevent them from devouring the crops, and to expel them from orchards, vineyards, and cultivated fields by means of exorcism and excommunication. Animals, which were in the service of man, could be arrested, tried, convicted and executed, like any other members of his household; it was, therefore, not necessary to summon them to appear in court at a specified time to answer for their conduct, and thus make them, in the strict sense of the term, a party to the prosecution, for the sheriff had already taken them in charge and consigned them to the custody of the jailer. Insects and rodents, on the other hand, which were not subject to human control and could not be seized and imprisoned by the civil authorities, demanded the intervention of the Church and the exercise of its supernatural functions for the purpose of compelling them to desist from their devastations and to retire from all places devoted to the production of human sustenance. The only feasible method of staying the ravages of these swarms of noxious creatures was to restort to 'metaphysical aid' and to expel or to exterminate them by sacerdotal conjuring and cursing. The fact that it was customary to catch several specimens of the culprits and bring them before the seat of justice, and there solemnly put them to death while the anathema was being pronounced, proves that this summary manner of dealing would have been applied to the whole of them, had it been possible to do so." (E. P. Evans, *The Criminal Prosecution and Capital Punishment of Animals*, London, 1906, pp. 2–3.)

The Beginnings of Crime Among Men

There is no historical account of the beginnings of crime among men, since they took place in the dim prehistoric past. Nevertheless there are sources of information from which we can derive facts of great significance with respect to this subject.

In the first place, the first men, like the men of today, belonged to the order of primates and the class of mammals. Consequently they shared the characteristic traits of the mammalian world. In other words, they had much the same instincts and emotions as the remainder of the mammalian world, and especially as the mammals most closely related to them, such as the other primates. These men probably differed from other mammals mainly with respect to intelligence, the superior excellence of the human intellect being man's most distinctive trait.

Possessing these mammalian traits, these first men experienced anger, sympathy, sexual passion, parental love, and all the other instinctive impulses and feelings which play an important part in determining human conduct. Their social tendencies led them to form social groups. As individuals they formed habits. As social groups they evolved customs, and violations of these customs doubtless aroused the characteristic reactions from the group which among animals I have called the equivalents or analogues of crime. When speech developed, it became more feasible to have public opinion and then moral ideas with respect to conduct. Furthermore, probably as a result of the stimulus to thinking from the interchange of ideas made possible by speech, magical and religious ideas began to develop which have also had a vast influence upon human conduct.

In the second place, numerous studies have been made of communities of a low order of culture, and there is reason to believe that the conditions found in these communities reproduce in a measure, or, should we say, perpetuate, the conditions which obtained in the early stages of human social evolution. Consequently, the crimes, or nearest equivalents to crimes, found in these primitive human groups probably indicate fairly well what were the first crimes, or analogues of crimes, among men.

Origin of Crime in Violations of Custom

All of these studies show that violations of the customs of the community constituted some if not all of the primitive crimes. "In primitive society custom stands for law, and even where social organisation has made some progress it may still remain the sole rule for conduct." [1] In most cases the laws of the higher stages of social evolution have developed out of the customs of the community, and even down to the present day in the most cultured communities changes in the laws are determined mainly by changes in the customs.[2] Indeed, many

[1] E. Westermarck, *op. cit.*, Vol. I, p. 161.

[2] "The laws themselves, in fact, command obedience more as customs than as laws. A rule of conduct which, from one point of view, is a law, is in most cases, from another point of view, a custom; for, as Hegel remarks, 'the valid laws of a nation, when written and collected, do not cease to be customs.' There are instances of laws that were never published, the knowledge and administration of which belonged to a privileged class, and which were nevertheless respected and obeyed. And among ourselves the ordinary citizen stands in no need of studying the laws under which he lives, custom being generally the safe guiding star of his conduct. Custom, as Bacon said, is 'the principal magistrate of man's life,' or, as the ancients put it, 'the king of all men.'

"Many laws were customs before they became laws. Ancient customs lie at the foundation of all Aryan lawbooks. Mr. Mayne is of opinion that Hindu law is based upon customs which existed even prior to and independent of Brahmanism. The Greek word *νόμος* means both custom and law, and this combination of meanings was not owing to poverty of language, but to the deep-rooted idea of the Greek people that law is, and ought to be, nothing more and nothing less than the outcome of national custom. A great part of the Roman law was founded on the *mores majorum;* in the Institutes of Justinian, it is expressly said that 'long prevailing customs, being sanctioned by the consent of those who use them, assume the nature of Laws.' The case was similar with the ancient laws of the Teutons and Irish." (E. Westermarck, *op. cit.*, Vol. I, pp. 164–5.)

Chapter VII in Westermarck, entitled "Customs and Laws as Expressions of Moral Ideas," gives an excellent discussion of this subject. It should, however, be noted that this title suggests that moral ideas always precede customs. Obviously this could not be so, and many customs must have existed long before man was capable of possessing moral ideas. The explanation of the title of this chapter probably is that inasmuch as Westermarck believes that morality can be traced back to certain so-called "moral emotions," morality in this affective form is to be found back of most if not all customs. If this is a correct explanation of this title, the use of the term "moral ideas" in this title is in part incorrect. I shall criticize Westermarck's theory of the "moral emotions" in Chapter XXIII.

customs will always exist in every human group, and there will always be some tendency on the part of the community to react in a hostile fashion to violations of these customs. However, there has already been a good deal of variation as to the number of customs which come to be sanctioned by moral ideas, religious beliefs, and magical practises, violations of which are punished by the group as a whole. It is possible that in the future a smaller number of customs will receive this sanction, and that consequently only personal and not social reactions will be possible against them.

The primary causes of the customs of any group are to be found in the innate traits of human beings and in the features of the environment. The customary relations between the sexes, between parents and offspring, etc., are determined in large part by instincts and feelings. The food customs are determined to a large extent by the environment. If the available food is in the form of wild beasts, various hunting customs arise. If the environment causes frugivorous habits, customs with respect to the gathering and the apportioning of the fruit arise.

Influence of Magic and Religion upon the Evolution of Crime

But secondary factors make their appearance when, largely as a result of the evolution of speech, religious and magical ideas and practises and moral ideas develop. Probably rather early in his career upon this planet man began to think about the nature and causes of his environment and of himself. His thinking was not necessarily for purposes of philosophic speculation, but probably for a pragmatic reason, namely, because he wanted to influence the forces of nature for his own benefit. As a result of this thinking he eventually evolved the animistic ideas which underlie all religious and magical beliefs and practises. Briefly stated, these ideas are to the effect that the events which take place in nature, and the occurrences which happen to or in man, are caused and governed by beings which are conceived to be more or less like the beings of the animate world, and sometimes like man himself. It is, therefore, to the interest of man to influence these so-called spiritual beings to regulate the affairs of the universe, or at least of that part of

the universe which concerns him, in such a manner as to promote the safety and happiness of man.

On the basis of these animistic ideas have developed a vast number of methods of influencing these alleged spiritual beings. These methods may be roughly classified into two main groups, though the distinction between the two is not absolute, and they tend to shade into each other. These are the magical and the religious methods. The magical methods are those by means of which it is attempted to coerce these spiritual beings to do the will of man. The religious methods are those by means of which it is attempted to persuade these hypothetical beings to do what is desired by man. These differences in methods have probably arisen in part out of differences of opinion as to the nature of these spiritual beings. Magical methods postulate the existence of spiritual beings which can be coerced. Religious methods postulate the existence of spiritual beings which may or may not be coerced, but which may possibly be persuaded. In many cases the co-existence of both of these orders of animistic beings has been postulated. For these reasons magical and religious methods have frequently accompanied each other, and have been practised at the same time and place.

Magical methods may be classified roughly into the methods of contagious magic and those of imitative magic.[1] The contagious methods are those which attempt to influence something through something else which has at one time been in contact with the first thing. For example, an attempt may be made to injure an enemy by doing injury to something which was at one time a part of him, as, for example, nail parings, hair, etc. The imitative methods are those which attempt to bring about desired events by causing other events which resemble in certain respects the desired events. For example, an attempt may be made to stimulate the fertilizing of the soil in order to secure a good harvest by going through the process of sexual fertilization.

It is obvious to civilized man that both of these kinds of magical methods are based upon false analogies. But this was not apparent to primitive men, and has not been clear to many human beings even to the present day. The gradual disap-

[1] *Cf.* J. G. Frazer, *The Golden Bough*, especially *The Magic Art and the Evolution of Kings*, Vol. I, London, 1911.

pearance of magic has come about, in the first place, as a result of the repeated failure of magical methods to attain the ends desired, and, in the second place, as a result of the spread of scientific knowledge with regard to the true causes of the events which take place in nature.

Furthermore, it is obvious that magic has to a large extent grown out of a process of mental association. In fact, many of those who have practised magic have lost sight of or have never been conscious of the animistic basis of magic, and have been governed entirely by the apparent similarities. It has been the weakness of magic that these mental associations have been with respect to superficial resemblances which have not necessarily involved any causal relations.

Religious methods have been and are of such a nature as to persuade the alleged spiritual beings; that is to say, they are propitiatory methods. These methods have included prayer, oblations and sacrifices of all sorts, and adulation in various forms of ceremonial worship. Like magic religion also has grown in large part out of mental associations with respect to superficial resemblances. Man has assumed, because of external resemblances between occurrences caused by man or by other animate beings and the other events which take place in nature, that these natural events are caused by spiritual beings similar to animate beings. But religion has one great advantage over magic which has enabled it to survive magic, and which may enable it to persist as long as mankind survives. This advantage is that the repeated failure of religious methods does not in itself discredit religion, for it is always possible to assume that the god or gods are unwilling to grant the requests of man.

The above paragraphs give a brief and categorical statement of the nature of magic and religion. It is obviously impossible to discuss here all of the complicated questions involved in the study of magic and religion. But it is necessary to have at least a general notion of their nature in order to be able to understand the important part they have played in social control in general and in penal treatment in particular.[1] This is especially true

[1] *Cf.* J. G. Frazer, *Psyche's Task, A discourse concerning the influence of superstition on the growth of institutions*, 2d ed., London, 1913.

In this book Frazer gives numerous examples of the ways in which reli-

with respect to primitive peoples, for we shall see that magic and religion have played a very important part, perhaps a predominant part, in determining the character of the first crimes.

Influence of Moral Ideas upon the Evolution of Crime

With regard to the influence of moral ideas in determining the character of the first crimes, it is impossible to speak with as much certainty. This is due partly to the fact that it is difficult to define moral ideas and morality. This is a question which I shall discuss in Chapter XXIII. Furthermore, it is difficult frequently to disentangle moral from religious and magical ideas, as, for example, to determine whether an act is forbidden because it is wrong in itself or because it is displeasing to a spiritual being.[1] Some writers have believed that the earliest crimes were determined only by religious and magical ideas, and that moral ideas, in the strict sense of the term, had no influence until later.[2]

gious and magical ideas have served as means of social control. He summarizes his study in the following words: —

"To sum up this brief review of the influence which superstition has exercised on the growth of institutions, I think I have shown, or at least made probable: —

"I. That among certain races and at certain times superstition has strengthened the respect for government, especially monarchical government, and has thereby contributed to the security of its enjoyment:

"II. That among certain races and at certain times superstition has strengthened the respect for private property and has thereby contributed to the security of its enjoyment:

"III. That among certain races and at certain times superstition has strengthened the respect for marriage and has thereby contributed to a stricter observance of the rules of sexual morality both among the married and the unmarried:

"IV. That among certain races and at certain times superstition has strengthened the respect for human life and has thereby contributed to the security of its enjoyment." (P. 154).

I think that Frazer exaggerates the value of this kind of social control and underestimates the harm which has been caused by superstition.

[1] *Cf.* C. S. Wake, *The Evolution of Morality*, London, 1878, Vol. I, pp. 293–4. Speaking of various acts which are punished among primitive peoples, Wake says: "It would be a mistake, however, to suppose that actions which such peoples declare to be punishable as crimes, are so treated because they are thought to be 'immoral,' as we understand the term." This author, however, does not seem to realize that many of these acts are punished as offenses against magical and religious ideas.

[2] *Cf.* H. Oppenheimer, *The Rationale of Punishment*, London, 1913, p. 91.

These, then, apparently are the factors which determined the first crimes. Custom doubtless was the earliest and the most important factor. Later appeared magic and religion to give their sanction to certain customs, and thus to strengthen these customs, to modify other customs, perhaps to suppress some customs, and to found some entirely new customs. Moral ideas also may have played a part as early as magic and religion.

The Earliest Crimes

Steinmetz, as a result of an extensive survey of crimes and punishments among primitive peoples, has prepared the following catalogue of "crimes first punished by the community": — [1]

1. Witchcraft.
2. Incest.
3. Treason.
4. Sacrilege.
5. Miscellaneous offenses, most of which are offenses against sexual morality, but including also poisoning, breaches of the hunting rules, etc.

Oppenheimer has rearranged this catalogue as follows: — [2]

1. Treason.
2. Witchcraft.
3. Sacrilege and other offenses against religion.
4. Incest and other sexual offenses.
5. Poisoning and allied offenses.
6. Breaches of the hunting rules.

In studying these crimes among primitive peoples it must be constantly borne in mind that since these peoples do not possess the art of writing, and since the state has not as yet evolved for them, a penal code, a code of criminal procedure, courts of public justice, in other words, law and its mechanism in the formal sense of those terms, cannot exist amongst them. Many acts which in civilized communities are punished by the law are in

"It was under the aegis of religion that the criminal code was born. In a subordinate way other factors may have helped its seeds to sprout; it remains nevertheless true that it is religious thought, religious fears and feelings which public punishment has to be fathered upon."

[1] S. R. Steinmetz, *Ethnologische Studien zur ersten Entwicklung der Strafe*, Leiden, 1894, 2 vols.

[2] H. Oppenheimer, *op. cit.*, p. 71.

primitive communities subject to private revenge. For example, killing is usually reacted against by retaliation on the part of the family of the victim. In a sense these acts also are crimes in the primitive community, for private retaliation is sanctioned by the public opinion of the community and is even expected by it, so that failure to exercize such retaliation would be regarded as indicating, to say the least, cowardice, if not graver culpability. On the other hand, these acts are not reacted against by the community as a whole, so that in this sense they cannot be regarded as crimes.

The offenses catalogued above are crimes in the sense that they are punished by the community as a whole. While there is no written law on the subject, it is clearly understood in the community that such acts are to be publicly punished. Whenever a member of the group has committed or is suspected of having committed such an act, an investigation or ceremony is held to determine the facts, which is a sort of rude prototype of a trial by a court of public justice. This primitive judicial process may be the gathering of evidence from witnesses by the elders of the group, or it may be an ordeal inflicted upon the suspected person, or it may be an incantation performed by a magician which is supposed to reveal the truth. When the accused person has been found guilty by one or more of these methods, appropriate punishment is imposed upon the culprit by the group as a whole or by its authorized agents. I shall describe primitive punishments later in connection with the study of penal treatment.

Treason is most likely to occur in connection with war. If the group, whether it be a horde, a clan, or a tribe, is at war with another group, and one of its members aids and abets the enemy, or even merely refuses to fight, he is punished for this crime which menaces the integrity and survival of the group. The nature of treasonable acts varies according to the organization of the group and the character of the environment.

Oppenheimer says that "witchcraft is probably the first in point of time, and certainly the most universal, of all primitive crimes." [1] It is doubtful if witchcraft as a crime is any earlier or any more universal than treason. However, it is certain that since a very early time, and almost if not quite universally, the

[1] H. Oppenheimer, *op. cit.*, p. 73.

practise of magic has been punished. But this does not mean that all magical practises have been punished. Magic may be divided into the so-called "white" and "black" magic. The white or good magic is the kind which benefits the group, by bringing needed rain, by destroying the enemy, etc. The black or bad magic does injury to the group, by blighting the crops, by bringing illness, etc. It is this bad magic which is punished by the group. Thus it comes about that to be a good magician is to merit great rewards from the group, while to be a bad one is to suffer severe punishments. Furthermore, to be a magician at all is likely to arouse suspicion, for it is impossible for the lay public to be certain that the magician is not using his power surreptitiously against the public. Hence the persistent suspicion against witchcraft which, as is well known, has lasted down to comparatively recent times, even in civilized communities.

Sacrilege is the religious correlative of witchcraft as a crime. If instead of or in addition to the somewhat impersonal powers postulated by magic, spiritual beings of a more personal character, such as gods, are assumed to exist, which cannot be coerced but can be pleased or offended, then it is greatly to the public interest that these beings should be pleased and not offended, for otherwise they may wreak divine vengeance upon the group.[1] Hence it is that those who have committed acts which are supposed to offend these sensitive deities must be punished, in order, if possible, to avert this divine vengeance.

Incest as a primitive crime may have originated as a violation of the rules of exogamy. This explanation is suggested by the fact that the scope of forbidden relationships is frequently much greater than among civilized peoples. I have not the space to discuss the origin of exogamy, whether it is due to an inborn aversion to sexual intercourse between near of kin, or to an acquired aversion to sexual intercourse between persons who have been closely associated with each other during early youth, or to some other cause.[2]

[1] Thus speaks the Hebrew Yahveh in the Mosaic law to those who offend him: — "For I the Lord thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me." (*Exodus*, XX, 5.)

[2] See the discussions in E. Westermarck, *op. cit.*, Vol. II, Chap. 40; *His-*

The regulation of sexual relations varies greatly among primitive peoples, as is clearly indicated by numerous facts which have been accumulated by the anthropologists. There is variation from a high degree of freedom approaching promiscuity to strict regulation. However, on the whole it seems to be true that there is little sexual morality in the civilized sense of the term; that is to say, very little regulating of sexual relations because they are right or wrong in themselves, as is frequently the case in civilization. Adultery, seduction, and rape are more likely to be regarded as private than as public wrongs, because they are violations of the proprietary interests of husbands and fathers. And even when these and other sexual offenses are treated as public wrongs, it is likely to be for religious and magical reasons. It is frequently believed that there is a causal relationship between sexual acts and the success of the group in warfare, hunting, etc. In fact, a great deal of magic and religion has centered about sex not only among primitive peoples but in civilization as well. This is doubtless due to the mysterious character of sex to those who have no scientific knowledge of its nature, because of the strange and powerful feelings it arouses, and because of the inexplicable physiological processes with which it is connected, especially in the female sex in connection with menstruation and reproduction.[1]

tory of Human Marriage, London, 1894, Chaps. XIV, XV; and in J. G. Frazer, *Totemism and Exogamy*, London, 1910, 4 vols.

[1] *Cf.* H. Oppenheimer, *op. cit.*, p. 85. "The close association which exists between our sexual life and the religious side of our nature is so well known to the student of the history of religious worship, to the psychologist and to the alienist that it cannot cause surprise if offence against sexual morality bear from the beginning a religious aspect. Indeed not until comparatively recent times in Christian countries have they ceased to fall within the special province of ecclesiastical jurisdiction. Again, the sensations and emotions to which the reproductive instinct gives rise, and the phenomena connected with its satisfaction are full of mystery to the civilized no less than to the savage, and at primitive stages of human thought magic properties are attributed to what is otherwise unaccountable in the experiences of the inner life, no less than to strange phenomena in the outside world. No wonder then that the rules relating to marriage are regarded as particularly sacred and that sexual relations between persons not allowed to intermarry are treated as offences of a particularly heinous type."

The mysterious character of the sexual processes, especially in woman, for most human beings is well illustrated in the Hebrew religion by the magical notion of the uncleanness of sex which was incorporated in that

The action of poisons and of curative drugs naturally is mysterious to primitive man. Consequently, he is prone to attribute their effects to supernatural properties. And if he has reason to believe that these properties have been imparted to them by magicians, and if their effect is bad as in the case of poisoning, then he will regard poisoning and similar offenses as black magic and will punish them as such. Hence it is that, as Oppenheimer says, "primitive toxicology is a branch of magic," [1] and that the public punishment of poisoning is due not so much to regard for human life as to fear of black magic.

It is of the utmost importance to the group to maintain the hunting rules, because hunting is frequently the main source of food. Some of these rules have obvious utility. Other rules are manifestly absurd to civilized man, as when incest is prohibited because it is supposed to interfere with success in hunting. Here again magical and religious ideas are having their influence. Totemic regulations probably in many cases originated as primitive game laws, but later acquired a magical or religious character which obscured their original purpose and frequently destroyed their utility.[2]

The preceding brief survey of some if not all of the principal primitive crimes indicates the origin and early evolution of crime. Back of these punitive reactions, both private and public, can be discerned fundamental human traits of mind and of character, such as the powerful emotion of fear and various instinctive reactions to remove the causes of fear, the powerful emotion of anger and various instinctive reactions to injure the object of anger. In the category of public punishments can be discerned both errors of commission and errors of omission. The errors of commission are due to the persistence of customs which are no longer useful, and to the influence of magic and religion. The errors of omission are illustrated in the comparatively little protection afforded by primitive public justice

religion. (See the extraordinary purificatory rites, especially for women, prescribed in *Leviticus*, XII and XV.) In the Christian religion, which was derived from Judaism, the magical notion of the uncleanness of sex has been combined with and has reënforced the ascetic ideal of propitiating the deity by expiation and purification through chastity. (See the Pauline epistle *I Corinthians*, VII.)

[1] H. Oppenheimer, *op. cit.*, p. 88.

[2] *Cf.* J. G. Frazer, *Totemism and Exogamy*, London, 1910, 4 vols.

to human life and limb and to property rights. This lack of protection is doubtless due in part to a low regard for human life and to a rudimentary development of property rights. But I have already stated that offenses against human life and sometimes also against property are frequently reacted against privately with the sanction of the community.

These offenses which were privately punished later developed either into crimes or into torts, thus giving rise to the distinction between the criminal and the civil law. Furthermore, magical and religious ideas had a considerable influence, as they still have, to act as a restraint upon these offenses spontaneously without regard to private or public punishment, because of the automatic consequences feared from the violation of these ideas. In this fashion the taboo system has been a powerful restraining force because of the dire consequences feared from any breach of the taboo.[1]

[1] See, J. G. Frazer, *Psyche's Task*, also *The Golden Bough*, especially the volume entitled *Taboo and the Perils of the Soul*, London, 1911; Hutton Webster, *Influence of Superstition on the Evolution of Property Rights*, in the *Am. Jour. of Sociology*, Vol. XV, No. 6, May, 1910, pp. 794–805.

CHAPTER III

CRIME AND SOCIAL CONTROL

The struggle for existence — The conflict between individual and social interests — Forms of social control: habit, custom, public opinion, religion, magic, the state, government, and law — Social utility the criterion for social control — The limits of social control — The characteristic features of crime — The definition of crime — Crimes created by religious, despotic, and class legislation — Vicious acts stigmatized as criminal: acts penalized in order to stimulate public opinion against them — The distinctive traits of the criminal class.

All forms of behavior come into being, in the first instance, in the course of the struggle of the individual for existence. Each individual must overcome the difficulties in the way of its existence if it is to survive. It must secure the food it needs, it must not succumb to the climate, it must defend itself against its enemies. The individuals which act in such a way as to attain these ends will survive, while those who fail to do so will be eliminated. So that there takes place a selective process in the course of which some individuals survive and are perpetuated, while other individuals are eliminated. In this fashion the struggle for existence determines what forms of behavior are to persist.

The Conflict Between Individual and Social Interests

In every social group conflict arises between the interests of the individual and the welfare of the group. Every person experiences impulses and desires which if gratified would injure other persons, and would give rise to continual warfare which would prevent social organization. These impulses and desires arise out of the instincts and emotions, which are the principal factors in the determination of human behavior.

These instincts and emotions lead sometimes to social and sometimes to anti-social behavior. For example, the instinct of pugnacity and the emotion of anger are continually giving

rise to acts of violence. These acts are usually injurious to society, though sometimes they are committed in the defense of society. Sexual impulses also sometimes give rise to acts of violence which are anti-social in their character. But the sexual impulses usually arouse a tender emotion which stimulates sympathetic feelings and frequently leads to acts of kindness. The parental instincts and emotions cause numerous altruistic acts of self-sacrifice, and are therefore powerful social forces. But, on the other hand, these instincts and emotions sometimes lead to anti-social acts, as when a parent does injury to many persons in behalf of his or her offspring. In similar fashion many other instincts and emotions under certain conditions lead to social behavior, and under other conditions lead to anti-social behavior. Some of these dynamic forces lead more frequently to social behavior, and other forces lead more frequently to anti-social behavior. But every human trait may be manifested either in a social or in an anti-social manner.

Social groups like individuals are engaged in a struggle for existence. It goes without saying that the survival of individuals is of primary importance, for without individuals there could be no groups. But in every social or partially social species the survival of the individual depends in part upon the survival of the group to which it belongs. Consequently, the behavior of the members of the group must in the long run promote the survival of the group. Thus it is that social instincts, sympathetic feelings, and intellectual activities which are socially directed tend to be preserved and encouraged in the social struggle for existence. On the other hand, anti-social instincts and feelings, and intellectual activities which are anti-socially directed, tend either to be eliminated, or, when too deeply rooted in human nature to be eliminated, to be restrained.

Forms of Social Control

This control of anti-social tendencies in most individuals comes in part from within. Some of the traits in human nature exercize a restraining influence over the anti-social tendencies of the other traits. For example, the sympathetic feelings may ameliorate somewhat the tendency to do injury to others which is encouraged by the pugnacious instinct. But this internal

control frequently is not sufficient, giving rise to the need for an external control. Consequently, many forms of social control have developed in human society.[1]

Habit is a very important form of control in society. It is true that habit is apparently an internal and not an external form of control. But even though each habit belongs to an individual and is formed by him, nevertheless habit is a form of social control, because the character of the habits formed depends largely upon social influences. In organized society many habits are drilled into individuals, so that the formation of habits is an important means of social control.

Custom is another important means of social control.[2] Certain customs are also the habits of many individuals. Thus in our own society the customary ways of eating food with knives and forks are also the habitual ways of the great majority of persons, because the acts involved are repeated so frequently as to become habitual. But other customs do not involve habits, because the customary acts involved are not repeated so frequently as to become habits. For example, in our society it is customary to marry. But it can hardly be said to be habitual, because the great majority of individuals do not marry more than a very few times at most, Custom brings about uniformity of behavior in matters in which uniformity is essential or, to say the least, desirable. Thus it is well to have a custom on the public highway that vehicles shall always pass to the right or always to the left, for otherwise there would be a good deal of disorder. But, as we shall see, custom also does injury to society by causing an excessive degree of uniformity, and by obstructing desirable changes.

Public opinion exists when the majority of a group have the same definitely formulated opinion about a certain matter, or, at any rate, when the majority of those who have a definite opinion agree. When public opinion concerns matters of conduct it frequently has a powerful coercive influence. In many cases an individual will suffer bodily injury when he acts contrary to the public opinion of the group to which he belongs.

[1] Some of these forms of social control are graphically described in E. A. Ross, *Social Control*, New York, 1901.

[2] *Cf.* W. G. Sumner, *Folkways, A Study of the Sociological Importance of Usages, Manners, Customs, Mores, and Morals*, Boston, 1907.

But even when bodily injury is not inflicted, he will usually experience mental discomfort which will deter him from acting contrary to public opinion.

Public opinion is closely related to custom. Some customs are due to public opinion as to how certain things should be done. On the other hand, many customs become established first, and then give rise to public opinion. It is impossible to ascertain which comes first in the majority of cases. However, it is probable that usually the custom becomes established without any conscious forethought, and then public opinion follows as an attempt to rationalize the customary mode of conduct.

When public opinion with regard to matters of conduct becomes strong, and involves the belief that certain forms of conduct are right and other forms are wrong, there arise moral ideas. These ideas have a powerful restraining force, because violations of them usually bring in their train penalties of various sorts. I shall describe the nature of moral ideas in Chapter XXIII, and a considerable portion of this book is devoted to describing penalties imposed upon violations of these moral ideas.

Religion frequently plays an influential part in regulating human conduct. Its representatives teach and preach the existence of powerful spiritual beings which desire and command men to act in specified ways, and assert that if men do not act accordingly they are liable to suffer severe penalties. To the extent that religious doctrines are believed they will influence the conduct of men. Furthermore, religious organizations such as the churches have been formed which have in many cases acquired a vast amount of power over the actions of men. The rules of conduct specified by religion frequently are the same as those which have already been developed by public opinion and have become moral ideas. When moral ideas and religious beliefs are identical religion gives support to the accepted standard of morality. Sometimes, however, the religious rules of conduct come from other sources.

Magical ideas also have played a part similar to that of religion in the earlier stages of social evolution, and still have much influence among primitive peoples and among the ignorant classes in civilized countries. Magic resembles religion in its belief in the existence of spiritual beings, but differs some-

what from religion in the measures it uses to influence these powers. In either case human conduct is regulated with reference to the alleged nature and desires of these spiritual beings.[1]

All of the means of social control so far mentioned existed in the earlier stages of social evolution. But there was usually no highly organized mechanism for putting them into effect. Frequently they were manifested through individuals who were wreaking personal vengeance for injuries done to themselves or to their relatives, but who were at the same time giving expression to the public opinion, customs, moral ideas, religious beliefs, and magical ideas of their group. The earlier forms of social organization, such as the tribe, had a rude mechanism for administering these means of social control.[2] A highly organized mechanism came into being with the evolution of the state and government. Government usually operates through law. Law is based in large part upon custom, public opinion, moral ideas, religion, etc. But the state through its government has special means for enforcing its laws. As a matter of fact, all forms of social control are eventually expressed to a considerable extent through the law and its enforcement. The most drastic and coercive part of the law is the criminal or penal law, and the acts prohibited by this branch of the law are crimes.

The Limits of Social Control

The forms of social control briefly described above and others which might be mentioned furnish the restraint upon the antisocial tendencies of the individual which is essential for the preservation of society. Utility for the survival of society is in the long run the determining factor with respect to these forms of social control, just as it is the ultimate determining factor throughout the struggle for existence. But the conditions which determine the criterion of social utility change continually, so that the forms of social control must change accordingly. Forms of social control which are suitable for one type of social grouping may not be suitable for another type, and may even lead to its

[1] *Cf.* J. G. Frazer, *Psyche's Task, A discourse concerning the influence of superstition on the growth of institutions*, 2d ed., London, 1913.

[2] See G. C. Wheeler, *The Tribe and Intertribal Relations in Australia*, London, 1910.

destruction. So that forms of social control change greatly from time to time and from one group to another.

It happens frequently, however, that forms of social control which no longer have social utility, sometimes indeed which have never had social utility, will persist for a time, even though they are doing injury to society. But this can happen only when they are not fatal in their effects, for otherwise they would destroy the social group. And we have reason to believe that many social groups have been destroyed by injurious forms of social control. Religion and despotism, sometimes each by itself, but frequently in unison, have at many times and places developed excessively drastic forms of social control which have been very injurious to a large part of the membership of the group. When this has been due to despotism, it has been in the interest of a few at the expense of the many. When it has been due to religion, it has resulted from the influence of beliefs to the effect that the spiritual beings feared by man demanded these drastic measures. When the two have worked in unison, the despot has usually been regarded as representing in some manner the spiritual beings, and therefore delegated to enforce the wishes of these beings. Despots have frequently found it useful to reënforce their own secular authority with this supernatural sanction. Examples of excessive forms of social control will be mentioned presently.

Hence it is that there are two aspects to the problem of social control and regulation. On the one hand, there must be enough control to preserve society against the anti-social tendencies of its individual members. On the other hand, for two reasons there should not be too much control. In the first place, an excessive amount of social control may lead to the destruction of the group itself, because of the injury it does to its members. But even when it does not destroy the group, more control than is essential for social survival is bad, because it limits the liberty of individuals unnecessarily. The restriction of individual liberty is a necessary evil so far as it is essential for social survival. It becomes an unnecessary evil when it is carried beyond this point. Individual liberty and social control always have been and always will be in conflict with each other to a certain extent, and it is one of the greatest of human and social problems to harmonize them.

The Characteristic Features and Definition of Crime

The most obvious feature of crime is that it is created by the law and is penalized by the law. The great majority of criminal acts are sins of commission. They are acts forbidden by the law on pain of punishment. Some crimes, however, are sins of omission. Such a crime is the failure to perform an act required by the law.

However, the legal definition of crime is hardly broad enough for our purpose, because the crimes which the law has designated have varied greatly from time to time and from place to place. We must distinguish features which have been more or less characteristic of crimes in general at all times and places.

It has generally been true that criminal acts have also been immoral acts. There are, however, occasional exceptions to this rule. Furthermore, the great majority of immoral acts are not criminal, so that it would be impossible to identify a crime by its immorality alone. Since they are immoral acts, crimes are almost universally recognized as wrong and as harmful to society. They usually include a considerable portion of the more serious immoral acts. Hence crimes are, generally speaking, the more serious of the anti-social acts, and are sometimes called the major anti-social acts.[1]

It is also true of crimes that usually they are acts of such a nature that it is more or less practicable to repress them. They are ordinarily acts which affect other persons directly. Consequently, it is usually known when they have been committed, and the injured persons are as a rule anxious to have the criminals punished. These persons are therefore ready to help the agents of the law to apprehend the criminal and to convict him of crime.

Furthermore, a crime usually is an anti-social act of such a nature that its repression is necessary or is supposed to be necessary to the preservation of the existing system of society. In other words, crimes are supposed to include the anti-social acts which are of life-or-death importance to the existing society, but may not include many acts which, while they are harmful socially, are not of such grave importance. As we have already seen, forms of behavior which might be fatal to one type of

[1] *Cf.* Havelock Ellis, *The Task of Social Hygiene*, London, 1912, Chap. IX.

society would not necessarily be fatal to another type of society, and might even be beneficial to it. This fact explains in part the differences between one society and another in the kinds of acts which are stigmatized as criminal.

Crime may, therefore, be defined as follows: *A crime is an act forbidden and punished by the law, which is almost always immoral according to the prevailing ethical standard, which is usually harmful to society, which it is ordinarily feasible to repress by penal measures, and whose repression is necessary or is supposed to be necessary to the preservation of the existing social order.*

Crimes Created by Religious, Despotic, and Class Legislation

I have already indicated that acts have frequently been stigmatized as criminal for religious or magical reasons. The prototype of this kind of social repression exists among savage peoples in the form of taboo. If a savage believes that it will be displeasing to a spiritual power for him to commit a certain act, he will refrain from doing it in order to avoid the vengeance which the spiritual power would otherwise wreak upon him and the group to which he belongs. Or the savage may not personify the spiritual power to this extent, but may believe that its automatic reaction to his act will be of such a nature as to do him injury. But if he does commit this act, his group is very likely to wreak vengeance upon him for thus endangering the welfare of the group, and this vengeance constitutes a primitive form of punishment. To an outsider it will frequently be obvious that the observance of the taboo is doing the individual and his group far more harm than its violation. But to the believer in a spiritual power of such a nature it will be perfectly reasonable to regard the violation of the taboo as immoral and criminal.

The same principle holds throughout every religion. No religion which has acquired a considerable following has failed to make criminal at law some at least of the acts which its tenets forbade. The history of our own occidental civilization is particularly rich in these instances, owing to our inheritance from the Hebrew theocracy. The Hebrew Yahveh was a stern and vengeful god. Consequently, the Hebrew religion and law regarded it as man's duty to punish offenses against God in

order to avert divine vengeance inflicted by the Hebrew deity. The Christian religion borrowed this idea along with much of the Hebrew religion. Consequently, the severity of the penal law among many Christian nations is to be explained in part by the fact that crimes have been punished not only as anti-social acts, but also as violations of divine law. Many examples of this may be found near at hand. During the Colonial days the Blue Laws of Connecticut furnished good examples. Much of the sabbatarian legislation of the present day is of the same origin.

Religion has frequently condemned on religious grounds an act which was already regarded as immoral, thus adding a supernatural sanction to the prohibition already existing against the act. In this manner religion has been a force for morality and the maintenance of society. But in other cases religion has condemned and has succeeded in making criminal many acts which could on no other ground be regarded as harmful. In our own recent history the puritanical nature of much of the religious teaching condemned and made criminal many forms of amusement which are now generally regarded as innocent and beneficial.

Whenever religion succeeds in stigmatizing as criminal acts which are not regarded as objectionable in any other way, most of the general characteristics of crime mentioned above do not apply. These acts usually do no harm to individuals or to society, they are not generally regarded as immoral unless the professional religionists succeed in educating public opinion to the point of thinking so, and their repression is not needed for the preservation of the existing system of society. Frequently also they are acts which it is not feasible to repress by penal measures.

As I have already indicated, there has been a good deal of penal legislation in the interests of despots. Much of the legislation concerning monarchs and royal families has been of this nature. For example, in the ancient English law many of the acts made treasonable by the law were acts directed against the royal family, but which would not necessarily have done any injury to society at large. Such legislation still exists in certain countries in the form of laws penalizing acts of *lèse majesté*. As the power of the kingship has declined, the extent

of such legislation has lessened. It has been encouraged in the past by the divine traits which have been attributed to kings, and which have not yet been entirely forgotten. This belief in a relationship between kings and divinity has arisen out of the fact that the kingship and godhood have in part the same origin in the minds of men.[1]

But there has probably been even more penal legislation in the interests of classes. Whenever a class has succeeded in gaining the ascendancy politically, economically, or otherwise, it has invariably enacted more or less penal legislation in its own interest. At various times and places the military class, the landholding class, the capitalist class, has passed legislation in its own favor. When the feudal barons in Europe attained the supremacy, they created laws penalizing the peasants who tried to leave their land, thus making the workers on their land practically their slaves. Up to the last century in England poaching was severely punished, because this was a violation of the vested rights of the landowning aristocracy. Today nothing is more jealously safeguarded by the law than the property rights of capital.

It is evident that crimes created by despotic and class legislation do not conform in the main to the characteristics of crime described above. The acts penalized by such legislation usually do not injure society outside of the small group in whose interest the legislation has been passed, they are frequently not regarded as immoral by the public at large, and their repression may not be necessary for the preservation of the existing society. In the past there has been a vast amount of sumptuary legislation regulating sometimes in great detail the life of the public at large at the will of the despot or of the ruling class. Religion has also played an important part in determining the character of sumptuary legislation.

Vicious Acts Stigmatized as Criminal

An act is sometimes stigmatized as criminal on the ground that it is vicious, even though it does not conform in the main

[1] For numerous examples of religious and despotic penal legislation see E. Westermarck, *The Origin and Development of the Moral Ideas*, London, 1906, Vol. I, Chap. 7.

to the general characteristics of crime mentioned above. It is an act which is or is supposed to be harmful to society, but which does no harm to any one directly, and which can frequently be carried on in secret with little fear of detection. In this country at present there is a strong tendency to penalize acts which are regarded by the public at large as vicious, as, for example, gambling, drunkenness, extra-marital sexual relations, etc. This situation raises the practical question as to whether it is feasible to repress vicious acts by penal means, and, if these laws are certain to become dead letters, whether it would not be preferable to use indirect means to attain this end. I shall discuss this problem in Chapter XXI.

Still another ground upon which acts are sometimes penalized is in order to stimulate public opinion against these acts. This has been done in the past for various reasons, as, for example, for religious reasons. It is often done nowadays in the interests of public sanitation, public safety, etc. There are many acts which do not injure any one directly and apparently have no evil results, and yet which cause much harm. On account of their apparent innocuousness there is no public sentiment against these acts. They may not even be regarded as vicious, much less as deserving penal treatment. But when their dangerousness is discovered the government may prohibit these acts, in the first place, to call attention to their harmful character, and, in the second place, to discourage people from committing them. An example of this sort of legislation is the law against spitting on the sidewalk. Until scientific research had revealed the fact that tuberculosis and other diseases are spread by germs in the sputum the dangerousness of such a practise was not recognized. Since this discovery was made this act has been forbidden by the law in many places. The complicated life of our modern civilization, especially under the urban conditions of a large city has made many kinds of conduct socially harmful which otherwise would not be harmful, and has led to much legislation of this sort. Here again the practical question may be raised as to the advisability of dealing with these acts by means of penal methods, or as to whether indirect methods would not be preferable.

We can now see that there have been and still are many instances of social control in the form of penal repression which

are not beneficial, and frequently are positively harmful. But obviously there is a limit to these instances, because an excessive number of them would lead to the destruction of society. In the course of social evolution there has taken place a process of the selection and survival of the desirable methods of control, so that social control has become more and more effective. Consequently, penal repression is now inspired not so much by blind vengeance as by the desire to secure the deterrence from and the prevention of anti-social acts.

The Distinctive Traits of the Criminal Class

In the light of the preceding discussion we may expect to find at any time and place those persons criminal who are most likely to commit the acts stigmatized as crimes at that time and place. For this reason it may appear as if every social system should have its own criminal types which would be entirely or in the main different from the corresponding types of every other social system. But while it is doubtless true that these types vary somewhat from one social system to another, yet it would be an error to carry this idea too far for the following reasons.

In the first place, certain acts are stigmatized as criminal under almost every social system. For example, murder is a crime in every civilized community. So that the persons who are prone to commit these acts are likely to become criminals in almost every community. Furthermore, as communities increase in similarity owing to the internationalization of culture, their legal and moral codes become more and more alike, and consequently their criminal types become more and more alike.

In the second place, inasmuch as the category of acts stigmatized as criminal is in most places rather extensive, it is difficult for any human being to live for any great length of time without committing some of these acts. Consequently, in every community there is some criminality diffused throughout the public at large, so that the line of distinction between the criminal and the non-criminal classes is by no means hard and fast. But most persons do not become known and are not punished as criminals, either because they do not commit these

acts with sufficient frequency to attract public notice, or because on account of their cleverness or for some other reason they are not caught.

In the third place, we have reason to believe that there are certain types of individuals who are very likely to become criminals under any social system. Several types of human beings are prone to violate legal and moral conventions, whatever those conventions may be. In every community are to be found intractable, rebellious, and unadaptable persons who are sure to react against any form of social control. In this group it may be possible to discern a universal criminal type which is to be found in every community. Consequently, while the personnel of the criminal class at any time and place is determined in part by the kinds of acts which are criminal, it is also determined in part, and perhaps in large part, by the traits of this universal criminal type.

We can now discern more clearly several considerations which must never be forgotten when studying the criminal class at any specific time and place. In the first place, it must always be borne in mind that the distinction between the criminal and the non-criminal classes is by no means a hard and fast one. In the second place, it is doubtless true that the kinds of acts which are stigmatized as criminal will determine in part what individuals are to become criminal. For example, at a time when crimes against the person are rigorously pursued by the law, the individuals who are prone to commit acts of violence against their fellow beings are likely to become criminals. But, in the third place, it is probably true, as I have already stated, that certain peculiarities can be distinguished of those who are criminal at all times and places. There are several types of persons who are always peculiarly prone to violate the legal and moral conventions which determine what acts are criminal. It is evident that the last condition limits the preceding one, and that the criminal class at any time is determined in part by what acts are criminal, but perhaps in larger part by traits which are more or less universally characteristic of this class.

I have already stated earlier in this chapter that the elementary traits of human nature are the fundamental factors in the determination of criminal conduct, as of every other kind of conduct. No one of these traits alone causes this conduct. For

example, there is no distinct instinct of crime which makes human beings commit crimes. Nor are there any instincts which invariably or almost always lead to crime. On the contrary, any instinct may under certain conditions lead to crime, while under other conditions it may lead to conduct having great social utility. The instincts are the product of a long process of evolution, and came into existence long before the laws which designate the crimes of today. Furthermore, these laws have not been devized by psychologists who were acquainted with the human instincts and wished to restrain some of them. On the contrary, they have been devized by men who usually have known nothing whatever about human psychology, but have wanted to prevent certain kinds of conduct which they believed to be socially harmful. Hence it is inaccurate to speak of a criminal instinct, or of an instinctive type of criminal.

In similar fashion, there are no specifically criminal feelings, but any feeling may under certain conditions lead to criminal conduct, while under other conditions it may impel towards socially useful conduct. As for the intelligence, when viewed by itself it is entirely unmoral in character. It acquires moral significance only in connection with the sort of conduct it happens to direct. In some circumstances it may direct instincts and emotions towards criminal conduct, and in other circumstances towards non-criminal conduct. But the influence of the intelligence is probably on the whole against crime, because it enables the individual to understand the need and justification for social control, and thus makes him more prone to heed the law.

There are, therefore, no peculiar crime factors in human nature. As a matter of fact, criminal conduct frequently results from the unusual strength of certain normal traits, or from the unusual weakness of certain restraining factors in human nature. Every human being has in him the making of a criminal. There are no saints, despite the canonizations of the church. In every one are to be found the emotions of anger and of jealousy which frequently lead to murder, the sexual passion which sometimes leads to sexual crimes, the germ of avarice which leads to various crimes against property, the love of pleasure and the lack of foresight which in their extreme forms

lead to various kinds of criminal conduct. In fact, if any human trait is born in a person in unusual strength, or is developed to an unusual degree in the course of the lifetime of the individual, or is stimulated to an excessive degree under unusual circumstances, it may lead to criminal conduct. In similar fashion, if some of the restraining factors in human nature are congenitally weak, or if they are not fully developed during the lifetime of the individual, or if they are weakened or inhibited under unusual circumstances, some of the normal traits may not be prevented from causing criminal conduct.

These facts indicate that no persons are born criminal in the sense that they are criminal at birth, or predestined at the time of their birth to become criminal. It is, however, convenient frequently to speak of several of these types of persons born with abnormal traits, which are very likely to lead them into criminal conduct, as being congenitally criminal. Criminal conduct is, therefore, like every other kind of conduct, the outcome of the coöperation of these internal factors in the determination of human behavior with the forces of the environment. In order to understand the criminality of criminals it is necessary to study both these internal factors and the external environmental factors.

PART II

CRIMINOGENIC FACTORS IN THE ENVIRONMENT

CHAPTER IV

PHYSICAL ENVIRONMENT — CLIMATE, SEASON, AND THE WEATHER

Influence of the physical environment in general — Influence of topography and the nature of the soil — Influence of climate, the seasons, and the weather — Meteorological factors mingled with cultural forces.

THE physical environment has much influence upon criminal conduct, as it has upon all other forms of human behavior. In one sense it is true that in the long run the physical environment is the only factor in the determination of human behavior; for it is this environment which has determined the organic evolution which has made possible the human species, and this environment has also determined the cultural evolution which has characterized mankind. But, while recognizing the omnipotence of the physical environment in this broad sense, it is desirable in an intensive, detailed study of human phenomena to distinguish between the influence of the physical environment and the organic and cultural factors which have been determined by this environment. Some writers have not made this distinction with sufficient clearness, and consequently have failed to give due weight to organic and cultural factors.[1]

The influence of the physical environment upon criminal conduct can be studied in some respects more or less directly, in other respects only indirectly. The influence of topographical conditions and the nature of the soil is very great, but can be studied only indirectly. For example, the population cannot be dense in a mountainous or in an arid region. But it is very likely to become dense in a fertile river valley, and to become highly concentrated in a city located upon a good harbor. In similar fashion, the wealth of the population of any region is determined in part by the topography and the soil of that region.

The influence of climate, season, and the weather upon crime

[1] For example, see the able but one-sided work of H. T. Buckle, *History of Civilization in England*, New York, 1903, 2 vols.

can be studied somewhat more directly. This involves the study of the temperature, the variations of heat and cold, the relative length of the days and the nights, the humidity of the atmosphere, and the movements in the atmosphere in the form of winds. Many statistics have been gathered which indicate several definite correlations between these telluric conditions and the extent and character of crime.

Influence of Climate

History shows that the peoples of hot climates have usually been less active than the peoples of temperate climates. Civilization has developed largely in the temperate zones, though it is probably true that some of the earlier stages in social evolution took place in the tropics. In historical times, at any rate, the dominant peoples have been those of the temperate zones. Excessive heat tends to depress human activity, while moderate cold stimulates it.

There is, however, one effect of heat which tends to increase one kind of activity. Excessive heat, and especially a change from a moderate to a hot temperature, stimulates the emotions and tends to increase irritability, thus leading to acts of violence. This fact doubtless explains the fact that crimes against the person are almost always more numerous in hot climates than they are in cold climates, and more numerous in the warm seasons than they are in the cold seasons. An additional reason for this phenomenon is that with a warm temperature an out-of-door life is led which offers more opportunities for many crimes against the person, such as assault, rape, etc.

Crimes against property, on the contrary, tend to decrease with a warmer temperature, and to increase as the temperature falls. This is doubtless due in part to the direct effect of the cold in stimulating the activity needed for many of the crimes against property. But in this case the influence of the temperature probably is more indirect than direct. With a warmer temperature there is usually a more abundant food supply, less need for clothing and shelter, and sometimes more employment, while the long nights of winter offer more opportunities for certain crimes against property, such as burglary and robbery.

I shall now cite a few statistics which illustrate these climatic

differences in crimes against the person and crimes against property and reveal a correlation between climatic variations and the extent and character of crime. The following table indicates the proportions between crimes against the person and crimes against property in the different parts of France: — [1]

	Crimes against the Person	*Crimes against Property*
Northern France	2.7	4.9
Central France	2.8	2.34
Southern France	4.96	2.32

According to these statistics the proportions between these two kinds of crimes become almost directly inverse from the northern to the southern part of France. While there are for every 100 crimes against the person 181.5 crimes against property in Northern France, there are in Southern France for every 100 crimes against the person only 48.8 crimes against property.

The following table furnishes similar statistics for the different parts of Italy: — [2]

For each 100,000 inhabitants there occur in

	Indictments for Crime	*Homicides, Highway Robberies with Homicide*	*Aggravated Theft*
Northern Italy	746	7.22	143.4
Central Italy	862	15.24	174.2
Southern Italy	1094	31.00	143.3
Insular Italy	1141	30.50	195.9

This table does not show the inverse correlation between the two kinds of crimes as clearly as the preceding table, probably owing to the intervention of various economic and other social factors.

Influence of the Seasons

I shall now cite a few tables which indicate a correlation between seasonal fluctuations and crime. The following ta-

[1] R. Mayo-Smith, *Statistics and Sociology*, New York, 1895, p. 270. These figures are taken from statistics gathered by Guerry for the years 1826–1830.

[2] C. Lombroso, *Crime, Its Causes and Remedies*, Boston, 1911, p. 13. Lombroso fails to specify what period of time is covered by these statistics.

ble shows the relation between sexual crime and season in France: — [1]

SEXUAL CRIMES IN RELATION TO SEASON IN FRANCE. 1827–1869
(After Ferri, percentages reckoned by Aschaffenburg)

SEXUAL CRIMES IN FRANCE. 1827–1869.

	ON ADULTS		ON CHILDREN		NUMBER OF CONCEPTIONS. 1863–1871	
	Absolute Numbers	%	*Absolute Numbers*	%	*Absolute Numbers*	%
January	584	7.09	1,106	5.57	2,603	7.84
February	563	6.84	1,041	5.24	2,661	8.02
March	643	7.82	1,366	6.88	2,608	7.85
April	608	7.39	1,700	8.56	2,887	8.69
May	904	10.98	2,175	10.95	3,060	*9 21*
June	1,043	*12.67*	2,585	*13.03*	3,018	9.08
July	860	10.45	2,459	12.42	2,911	8.76
August	794	9.64	2,208	11.13	2,742	8.25
September	653	7.93	1,773	8.93	2,810	8.46
October	532	6.46	1,447	7.29	2,625	7.91
November	514	6.24	983	4.95	2,620	7.89
December	534	6.49	939	5.05	2,665	8.02
Unknown	1,421	....	16,160	.....	....	....

This table shows clearly that these crimes increased greatly during the warmer months, reaching their maximum in June. This is probably due in part to a periodicity in the sexual life of man which appears to reach its apogee in the spring or early summer, and which was doubtless caused originally by seasonal changes. It is also due in part to the out-of-door life of the warmer months. But it is doubtless due to a certain extent to the erotic stimulation of heat.

It is interesting to compare the figures for these crimes with the figures for the days of conception during a period of years which are given in the same table. These figures indicate a slight increase in the number of conceptions during the warmer months which reach their maximum in May. This suggests the possible existence of the sexual periodicity mentioned in the preceding paragraph.

[1] Rearranged from G. Aschaffenburg, *Crime and Its Repression*, Boston, 1913, p. 16. The figures are taken from E. Ferri, *Das Verbrechen in seiner Abhängigkeit von dem jährlichen Temperaturwechsel*, p. 38; *Studi sulla criminalità ed altri saggi*, p. 81.

The following table shows the seasonal distribution of criminality in Germany: — [1]

THE CRIMINALITY OF GERMANY DISTRIBUTED ACCORDING TO THE YEAR AND MONTH WHEN THE CRIMES ARE COMMITTED

If there are 100 offenses per day in the year, there are per day in the month

Kind of Crimes and Offenses	*Jan.*	*Feb.*	*March*	*April*	*May*	*June*	*July*	*Aug.*	*Sept.*	*Oct.*	*Nov.*	*Dec.*
Crimes and offenses against national laws	95	97	90	92	99	103	105	*109*	105	103	103	98
Resisting officer	89	94	89	94	97	104	109	*117*	112	104	99	90
Breach of the peace	94	99	96	100	98	101	105	*110*	106	102	100	89
Rape	64	66	78	103	128	144	*149*	130	108	90	68	69
Obscene acts, distribution of obscene literature	62	74	83	101	130	*150*	141	133	109	84	69	64
Insult ("Beleidigung")	83	89	85	93	108	115	120	*122*	113	99	93	80
Infanticide	89	*127*	*127*	121	118	102	95	80	91	86	82	87
Simple assault and battery	76	80	79	95	108	116	124	*134*	121	102	88	74
Aggravated assault and battery	75	78	78	95	108	113	118	*133*	124	106	93	78
Crimes against property	109	108	96	90	93	93	92	93	93	104	113	*117*
Petit larceny, also when repeated	113	115	98	85	87	88	88	92	92	106	117	*121*
Grand larceny, also when repeated	102	107	92	89	94	98	98	94	96	106	*112*	111
Embezzlement	100	97	94	94	98	100	103	101	98	104	105	*108*
Fraud, also when repeated	112	108	95	88	92	92	92	93	90	88	102	*121*
Malicious mischief	88	92	98	108	*109*	106	104	104	103	101	99	88

This table is based upon the criminal statistics for the period from 1883 to 1892. It shows clearly that the maxima for all of the crimes against the person, except infanticide, during this period came during the warmer months, while all of the maxima for the crimes against property came during the colder months.

The above tables contain only a small part of the vast mass of statistics which have been gathered with respect to the influence of climate and season upon crime. But there is an important exception to the usual form of this influence. Statistics have been gathered which indicate that in tropical countries crimes against the person do not increase during the warmer seasons, as happens in the countries in the temperate zones. In tropical countries the temperature is high the year around, but becomes excessively high during the warmer seasons, thus tending to depress activity of all kinds, even acts of passion and violence. Furthermore, there is some reason for believing that in tropical countries crimes against property do not increase during the cooler seasons over their number during the hotter seasons to the same extent that they increase in the countries of the tem-

[1] G. Aschaffenburg, *op. cit.*, p. 17. Taken from the *Statistik des Deutschen Reichs*, Neue Folge LXXXIII, II, p. 52.

perate zones. If this is true, it is probably due in large part to the fact that there is not so much variation in human needs between the hotter and the cooler seasons in the tropics as there is in the temperate zones.[1]

Influence of the Weather

In addition to the temperature there are other conditions which go to make up what is ordinarily called the weather which doubtless have some influence upon crime. Among these are atmospheric pressure, winds, humidity, sunshine, rain, and cloudiness. Unfortunately the influence of these conditions has not been studied very much as yet. One of the best studies of this sort was made by Dexter [2] of the influence of the weather upon a number of kinds of crime in New York City, the results of which he compared with the results of a similar study which he made in Denver. To the results of these studies he tries to give a physiological and psychological explanation.

Dexter compared the record of arrests for assault and battery in New York City, these arrests numbering about forty thousand, during the years 1891–7, with the meteorological conditions during the same period. He found [3] that the number of arrests increased quite regularly with the rise in temperature, which led him to the conclusion

[1] Corre has made an intensive study of the relation between temperature and crime in the island of Guadeloupe in the West Indies. He formulates the law of this relation in the following terms: —

"Il existe une connexion plus ou moins étroite entre la marche de la température et celle du crime, dans les divers milieux;

"Dans les pays froids ou tempérés, c'est à dire à saisons bien tranchées, la chaleur parait agir comme agent stimulant: le crime croît avec elle en intensité.

"Dans les pays chauds ou à saisons peu tranchées, la chaleur parait agir inversement, et c'est quand elle presente une diminution dans ses moyennes, en même temps que les plus forts ecarts entre ses extrêmes, que les crimes augmentent; le maximum de la criminalité coïncide avec les minima thermiques." (A. Corre, *Facteurs généraux de la criminalité dans les pays créoles*, in the *Arch. d'anth. crim.*, Vol. IV, 1889, p. 165.)

[2] E. G. Dexter, *Weather Influences, An empirical study of the mental and physiological effects of definite meteorological conditions*, New York, 1904; *Conduct and the Weather*, Monograph Supplement, No. 10, *The Psychological Review*, May, 1899. See also several articles by the same author in various scientific journals.

[3] *Weather Influences*, pp. 141*ff.*

that "temperature, more than any other condition, affects the emotional states which are conducive to fighting." The curve for the females rose more rapidly than the curve for the males with the increase in temperature, which he regards as "a suggestion of what most of the curves show where a comparison of the two sexes is made, — namely, a greater susceptibility of women to weather influence." Such irregularities as exist in the curves he explains as follows: — "The minor fluctuations of the curves may be disregarded, as they are very probably due to accidents, but the general showing is one of marked deficiency for low temperature with a somewhat gradual increase to its maximum excess in the 80°–85° group, at which point a sudden drop takes place. This final decrease is in itself interesting. It seems without doubt to be due to the devitalizing effect of the intense heat of 85° and above."

In similar fashion he compared these arrests with barometrical conditions and found that as the barometer fell the number of arrests rose. He suggests that this was not due to the actual weight of the atmosphere, but because low barometrical conditions frequently immediately precede storms, and that the "feeling" of an approaching storm caused in many persons the emotional state which led to fighting. Little difference appeared here between the effects upon the two sexes.

With respect to humidity he found "excesses of assaults for low readings and deficiencies for high ones." He explains this on the ground that "days of high humidity are not only emotionally but vitally depressing, and we have the same element entering into our problem that we had in the discussion of excessively high temperatures. On such days we perhaps feel like fighting, but such a thing is altogether too much exertion, and the police records are none the wiser. For low humidities, energy is at a surplus; and although the emotional state is ordinarily much more positive, it would seem as if, in the long run, with plenty of strength at command, an opportunity to use it is generally to be found." The females seemed to be restrained from fighting by the high humidities more than the males.

With respect to wind, his curves showed him that "the mild winds of between 150 and 200 miles per day (40 per cent. of the days of the year have such) are the pugnacious ones." During periods both of calm and of high wind the number of arrests fell. He does not attempt to explain why high wind has this effect. But he thinks that during calm there is an excess of carbon dioxide in the atmosphere which lessens the vitality.

With respect to the character of the day as to fairness and cloudiness he found that "the cloudy days are the freest from personal encounter

which has attracted the police." He explains this on the ground that "the cloudy days are not the vitalizing ones, but the reverse."

This study of assaults in New York he compares with a similar study of 184 murders in Denver during the years 1884–96. With respect to temperature and weight of atmosphere his results were about the same as in New York. But with respect to humidity he found that murders increased during excessively dry periods. This, he thinks, is due to the increased potential of atmospheric electricity in the excessively dry Colorado atmosphere. He found also that murders increased with high winds, and thinks that this also is due to "the super-induced electrical potential of the atmosphere which increases with the wind." As to the character of the day, he found that murders were more frequent on cloudy and wet days. He thinks that this is due to the fact that such days are unusual in the Colorado climate, and consequently affect the emotions in such a way as to produce a mental state of great instability in which dangerous impulsive acts are liable to be committed.

Dexter also studied drunkenness in New York City.[1] His data were the arrests for intoxication, 44,495 in number, in the Borough of Manhattan during the years 1893–5. With respect to temperature he found "a deficiency for the hot summer months, and a corresponding excess for the colder ones of winter, there being 47 per cent. less for July than for December, with a somewhat gradual change from one to the other." The results with respect to other meteorological conditions were not so significant, and he summarizes the results of his investigation of drunkenness in New York as follows: — "Arrests for drunkenness are far more prevalent during the colder months of the year than during the warmer; vary inversely as the temperature, being excessive for low and deficient for high readings of the thermometer; are but slightly affected by varying atmospheric pressure, though are somewhat above the normal for conditions of high barometer; increase as both the humidity and the wind increase; show slight influences from days of different character, though are somewhat excessive for clear, dry days."

Dexter studied a number of other forms of conduct in their relation to the weather, such as the deportment of children in schools, of delinquents in prisons and of the insane in asylums; suicides; clerical errors, etc. I have not the space to summarize all of these investigations, but will quote his summary of his study of suicide. "Suicide is most prevalent in the late spring and summer months; is excessive at both extremes of temperature, and somewhat above the normal for days of moderate heat; is excessive in medium pressure of the air,

[1] *Op. cit.*, pp. 219*ff.*

and deficient for the extremes of pressure; increases with regularity as humidity and wind increase from a deficiency of low readings of both; is excessive for clear, dry days." [1]

Dexter derived a number of conclusions from his investigations which I will quote briefly.[2] "*Varying meteorological conditions affect directly, though in different ways, the metabolism of life.* . . . Some of them seem to be of such a character as to accelerate the vital processes of oxidation, and others to retard them. For want of better terms, I shall call the former *anabolic*, the latter *katabolic*, conditions. High temperature, high winds (better ventilation), fair days with low humidities as an accompaniment, are *anabolic;* while low temperatures, high barometric conditions, calms, rainy and cloudy days and high humidities, because of their opposite characteristics, are *katabolic.*" "*The 'reserve energy' capable of being utilized for intellectual processes and activities other than those of the vital organs is affected most by meteorological changes.*" "*The quality of the emotional state is plainly influenced by the weather states.* . . . *Although meteorological conditions affect the emotional states, which without doubt have weight in the determination of conduct in its broadest sense, it would seem that their effects upon that portion of the reserve energy which is available for action are of the greatest import.*" "*Those meteorological conditions which are productive of misconduct in a broad sense of the word are also productive of health, and mental alertness: as a corollary, misconduct is the result of an excess of reserve energy, not directed to some useful purpose.* . . . On the whole, it would seemingly be safe to say that of the activities (or cessation of activity) possible to human beings some are the result of excessive vitality, and others of a deficiency; and that generally speaking, those misdemeanors which have been classed under our study as those of Conduct are the results of the former, while sickness and death are accompaniments of the latter."

Meteorological Factors Mingled with Cultural Forces

It is indeed difficult to disentangle the influence of a single meteorological condition from the influence of other meteorological conditions and cultural forces which affect human con-

[1] *Op. cit.*, p. 218. [2] *Op. cit.*, p. 266*ff.*

duct. It is important to bear in mind that while statistical data, such as we have been considering, may indicate a correlation between a certain meteorological condition and a certain kind of conduct, this does not necessarily mean that this condition is the direct cause of the conduct. It may determine the cause of the conduct. Or it may be a result of something from which also results the cause of the conduct. In fact, correlation may be due to various relations other than a direct causal relation.

Dexter apparently believed that criminal conduct results in the main from excessive vitality which is misdirected. It is unfortunate that he did not study a wider range of criminal conduct. The forms of conduct which he studied were mainly acts of disorderliness or of violence, such as crimes against the person. It was perhaps to be expected that meteorological conditions would exhibit much influence upon these forms of conduct. If he had studied crimes against property, for example, he would perhaps have discovered that these crimes are due rather to a deficiency of vitality which leads certain individuals into dishonest conduct in the place of the more arduous honest methods of securing the things they desire.

Furthermore, it is evident in connection with the forms of conduct studied, as Dexter himself points out, that excess of vitality does not lead every person into these forms of conduct, but that on the contrary it leads many individuals into conduct of the highest excellence. It is when this vitality is misdirected that it results in the abnormal and pathological forms of conduct. Hence it is necessary to search for the causes of the misdirecting elsewhere than in the meteorological conditions, and this search will bring us closer to the immediate causes of criminal conduct. We shall find these causes in some cases in abnormal congenital traits, in other cases in abnormal traits which have developed in the individual, in still other cases in environmental conditions of an unusual nature.

But climate and weather have effects upon human beings other than those mentioned above, which cannot be measured by statistical methods. For example, in New York City, as over a large part of this country, the climate is characterized by great extremes of temperature, ranging from the extreme heat of summer to the extreme cold of winter. Furthermore,

great changes in temperature sometimes come very suddenly. These climatic conditions give rise to a certain amount of nervousness and irritability which leads in some cases to crime. But it is impossible to correlate this nervous state directly with the meteorological conditions which give rise to it in large part.

Furthermore, climate and weather have much influence upon criminal conduct apart from their direct effect upon human beings, namely, through their influence upon industrial and social conditions in general. For example, to take a specific instance, the activities of a pickpocket depend almost entirely upon the existence of large crowds of people. As I write these words, a heavy thunder shower is pouring down, and has driven almost every one from the usually crowded city street. Extreme cold is likely to have the same effect. So that the weather governs to a large extent the activities of pickpockets.

To take a much more important instance, there are many occupations which are seasonal in their nature in the sense that there is a great deal of work in these seasonal occupations during certain seasons, and much less or none at all during the rest of the year. A person engaged in one of these occupations will be unemployed during a part of the year, unless he can secure employment temporarily in another occupation. Inasmuch as these seasonal occupations have not as yet been dovetailed with each other to any great extent, much unemployment results from their seasonal character. In Chapter VI will be described the influence of unemployment and various other economic conditions upon crime.

CHAPTER V

URBAN AND RURAL CRIME AND VICE — DEMOGRAPHIC FACTORS

Influence of demographic conditions — Apparent preponderance of urban over rural criminality — Forces which accentuate urban criminality: the concentration of population increases human desires, causes greater conflict of individual interests, intensifies the struggle for existence, and creates more opportunities for crime — The organization of vice in cities — Unorganized vice in the country — Influence of the growth of population upon crime.

ALL social phenomena are influenced by the density and distribution of population. Civilization itself could not have evolved until the human population had attained a relatively high degree of density. In the sparse populations of prehistoric peoples and of the primitive peoples which have survived down to the present day, conditions with respect to crime have been somewhat as described in the chapter on the origin and evolution of crime.

In a region newly settled by civilized men frontier conditions prevail until the population becomes relatively dense. The criminality of these frontier communities is usually of a rough and boisterous sort, such as banditry and brigandage. The corresponding crime on the sea is piracy. But these frontier conditions are ordinarily transitory in their nature.[1] Only in a few backward countries, such as Corsica,[2] Turkey, etc., do these conditions persist for a long time.

The concentration of population is of even greater significance for the study of crime. This concentration takes the form of towns and cities. All of these urban communities will be

[1] Speaking of crime in civilized countries (Europe in particular) in relation to density of population, Lombroso says that "theft increases with density, while homicide diminishes." (C. Lombroso, *Crime, Its Causes and Remedies*, Boston, 1911, pp. 59–60.)

[2] *Cf.* A. Bournet, *La criminalité en Corse*, in the *Arch. d'anth. crim.*, Vol. III, 1888, pp. 6–31.

designated as cities in this chapter. The crime and vice of cities exhibit peculiarities as contrasted with the crime and vice of rural districts. I shall, therefore, devote this chapter mainly to a comparison of urban and rural crime and vice.

Apparent Preponderance of Urban over Rural Criminality

There is a widespread opinion that there is a great preponderance of crime and vice in urban as compared with rural communities. It is impossible to make an accurate comparison so far as vice is concerned, owing to the secret nature of a good deal of vice. This opinion so far as it concerns vice is based upon the fact that there appears to be much more prostitution, drunkenness, gambling, etc., in cities than in the country.

With respect to crime also it is difficult to make an accurate comparison, though there are some statistics which may be used for this purpose. These statistics seem to indicate that the city is more criminal than the country. For example, it has been estimated that the proportion of the urban to the rural population in Italy (*Annuar. Stat.*, 1881, p. 112) was 32 to 68, but that in criminality they were more nearly alike, the proportion being 43 to 57. In other words, the urban population had a larger percentage of the criminality of the country than of the population. In similar fashion it has been estimated in France (*Compte génér.*, 1880) that while the urban population is only about 30 per cent of the whole population, it has about the same number of crimes as the rural population.[1] It has been estimated in Germany that in cities and districts with more than 20,000 inhabitants there are 134.2 criminals per 100,000 adults in the population, while in the rural districts there are only 96.6.[2]

Such statistics are, to be sure, not conclusive. It may be that crimes are not pursued in the rural districts so effectively as they are in the city, so that the record of rural crimes is more incomplete than that of urban crimes. Owing to inefficient police protection this has usually been true in the rural communities

[1] *Cf.* A. von Oettingen, *Die Moralstatistik in ihrer Bedeutung für eine Socialethik*, Erlangen, 1882, p. 499.

[2] G. Aschaffenburg, *Crime and Its Repression*, Boston, 1913, p. 62.

in this country. In fact, certain statistics are available which seem to indicate that police efficiency in some cities has lowered the urban criminal rate below the rural rate. For example, in 1890–1891 in England there were in the counties, 1.20 criminals per 1000 of the population; in the boroughs, 1.20 criminals per 1000 of population; and in London, 0.41 criminals per 1000 of population.[1] The low rate in London was apparently due to the fact that the police were keeping a careful record of the thieves, receivers of stolen goods, etc.[2] It may also happen that some of the rural criminals and rural crimes are reported in the urban record, because the criminals are caught in the city, or the crimes are tried in the city.

But even though these statistics are not conclusive, we are probably justified in assuming that there is more crime in the cities than there is in the country. This, however, does not necessarily mean that the urban population is more criminal in character than the rural population. There may be differences between the urban and rural environments which give rise to this difference in the amount of crime.

Forces which Accentuate Urban Criminality

Social evolution has been characterized on the whole by an increase in the amount of crime and vice. As ideas with regard to right and wrong conduct have developed, legal and social conventions have appeared, violations of which constitute criminal and vicious acts. Furthermore, the progress of civilization has multiplied human desires and needs, and the effort to satisfy these desires is likely in many cases to lead to criminal or vicious conduct. The increase in the density of population constantly creates new conditions in which more regulations are necessary to harmonize the conduct of individuals with each other. This situation becomes especially acute when the population is highly concentrated and congested as in a large city. A good deal of crime in a large city is due to violations of ordinances with respect to tenements, factories, sanitation, etc., which would be absolutely unnecessary in small communities.

These features of social evolution and progress which in-

[1] England and Wales, *Judicial Statistics*, 1891, p. x.

[2] R. Mayo-Smith, *Statistics and Sociology*, New York, 1895, pp. 272–3.

crease the amount of crime and vice have more effect in urban than in rural communities. The highest existing stage of civilization is to be found usually in the cities, and the scale of desires and needs of the urban dweller is usually more extensive than that of the rural dweller. So that social evolution and progress in general may explain in part the apparent preponderance of crime and vice in cities. This explanation cannot be proved statistically, but the considerations mentioned above suggest it.

There are, however, more immediate causes for this difference between urban and rural communities. Owing to the congestion of population, imitation probably plays a more important part in causing crime in the city than in the country. The newspaper accounts of crime aid greatly by furnishing suggestions to impressionable minds. Owing to the suggestibility of the crowd, crime waves are more likely to take place in cities than in the country.

Society is constantly becoming more complex, so that it is more and more difficult for social groups to function normally. This is particularly true in the city, where the social environment is usually far more complex than in the country. Persons weak in mind or in character find it particularly difficult to adjust themselves to the complexity of the urban environment. In any organized society the idiots and low grade imbeciles cannot function normally, and have to be treated in a special way, either by being exterminated quietly or by means of incarceration in prisons or by internment in asylums and hospitals. But the high grade imbeciles and the high grade feebleminded or morons may succeed in making their way without any special treatment.

Let us take the case of a moron, for example. In a rural environment such a person is likely to find simple work, and there are usually persons who exercize a watchful care over him or her. Furthermore, there are no difficult problems to be solved or unusual temptations to be faced. At worst the moron is not likely to become more than a ne'er-do-well or possibly a pauper. But in a city such a person is confronted with a much more complex situation and many more temptations. He or she is not so likely to have relatives or friends to watch over him or her, or at any rate these persons find it more difficult to exercize a watchful care. The result is that the high grade imbecile and

the moron is much more likely in the city than in the country to become a criminal, a drunkard, a prostitute, a mendicant, a vagabond, or a pauper.

It is probably true of several other abnormal types as well that they are more likely to become criminal or vicious in the city than in the country. For example, those who are abnormal in their instinctive or affective equipment in such a way as to lessen their resistance against certain kinds of anti-social conduct experience more temptations to such conduct in the city than in the country, and therefore are more likely to become criminal or vicious in the city than in the country.

To be sure, the advantage is not always on the side of the rural community. As I shall show presently, there are certain kinds of crime which are more prevalent in the country than in the city, apparently owing to peculiarities of the rural environment. But while we cannot prove the matter statistically, it is highly probable that the urban environment stimulates these abnormal types to crime and vice more than the rural environment.

The same difference doubtless exists for normal individuals as well. Normal individuals also are confronted with more difficult problems and more temptations in an urban than in a rural environment, and consequently a larger number of them are likely to succumb to crime and vice.

There are many kinds of crime which can be committed only or best in cities. For example, the picking of pockets is a common crime in the city, whereas it would be very difficult to practise this crime in rural communities, partly because there are few crowds in which the pick-pocket can get close to his victim and commit his theft unobserved, and partly because it is usually impossible for the thief to disappear quickly after committing his crime. There is a much wider field for burglary in the city than in the country, because there are many more dwelling houses containing valuable articles, and jewelry stores, banks, etc., containing valuable objects which are worth stealing. Furthermore, it is usually more feasible for the burglar to disappear quickly after committing his crime in the city than in the country, where he may have to go a long distance before he can cover up his tracks. Blackmail is much more prevalent in the city than in the country, because wealthy victims are more numerous. The field for committing business crimes is much

wider in the city than in the country, because commerce and industry are centralized in cities. Consequently, embezzlement, forgery, fraud of various kinds, and many other business crimes are most prevalent in cities. Furthermore, as has already been indicated, there are many so-called crimes with regard to tenements, factories, highways, etc., which cannot be committed at all or only to a very slight extent in small communities.

On the other hand, there are several crimes which are more frequent in the country than in the city. For example, it has been estimated that there is more infanticide in the country than in the city. The reason for this is obvious. It is more difficult in the country for the woman, unmarried or married, to get rid before birth of a child that is not wanted. There are not the midwives and doctors at hand who are ready to procure an abortion. In the cities, on the other hand, criminal abortion is much more frequent than in the country.

It has been estimated that crimes against the person are committed more frequently in the country and crimes against property in the city. In other words, rural criminality is on the whole more violent than urban criminality. Lombroso expresses this opinion in the following words: — "The urban and the rural districts have each their own specific type of criminality. The crimes in the country are more barbarous, having their origin in revenge, avarice, and brutal sensuality. In the city the criminality is characterized by laziness, a more refined sensuality, and by forgery." [1] It has, however, unfortunately been true that there have been many crimes against the person in American cities, owing in part to ineffective police protection.

The progress of science has aided the criminal more or less, and scientific methods can usually be applied most feasibly in the city, as, for example, in opening safes, or in making counterfeit money. Furthermore, these methods are used principally by the professional criminal, who is the most intellectual type of criminal, with the exception of the political criminal and the criminal by passion. The professional criminal carries on his operations largely in the city for various reasons, as, for example, because it is more profitable, and because he prefers urban life. The use of scientific methods by the criminal class should be more than counterbalanced by the use of scientific methods

[1] *Crime, Its Causes and Remedies*, Boston, 1911, p. 74.

by the agents of the law. This will probably happen in course of time, but the police have not as yet made extensive use of scientific methods.

There are several reasons why criminals gravitate toward the cities for carrying on their operations, and for purposes of residence. As has already been indicated, a wider range of crimes can be committed in the city than in the country, many of them of the more profitable sort. As has also been indicated, it is usually more feasible for a criminal to hide himself in a city than in rural communities. After committing a crime he may elude pursuit more easily in the maze of city streets, crowded during the day and deserted at night, and in the numerous houses in which he may take refuge; whereas in the open highways of rural districts he can usually be pursued more easily with the aid of the telephone and be captured.

The city furnishes a more feasible residence for the criminal than the country. In a small community it is impossible for any one to live very long without his occupation becoming known to his neighbors. Any one who refuses to make his occupation known soon becomes a suspicious character, which would be very dangerous for the criminal. In the city, on the contrary, a person may live and work unnoticed by his nearest neighbors, so that it becomes the function of the police alone to watch the criminals and suspicious persons. If the police perform this function well, the city also will become a dangerous place for the criminal. But unfortunately the police have frequently failed to perform this function efficiently.

In addition to all the reasons suggested above as to why criminals are more likely to live in cities rather than in the country is the fact that a criminal usually finds city life more agreeable than country life. In the city he finds the social life of the underworld, of the "Tenderloin," which cannot possibly exist in the country. As the criminal is more or less social like all other human beings, he craves a social circle in which he can move freely. Furthermore, in the city he can indulge in many vicious practises the enjoyment of which is not possible at all or is very limited in the country. This is due largely to the fact, which I shall discuss presently, that the means for the enjoyment of certain vices can be organized in the city in a way which is almost impossible in rural communities. In fact, life in a rural district

would be so dull for most criminals that they would have little incentive to carry on their criminal activities in order to secure the means for the enjoyment of the pleasures which they crave.

An additional reason for the preponderance of criminals in cities may be that the city furnishes a better breeding ground for criminals than the country. If the urban environment is of such a nature that persons born in it are more likely to have the abnormal and pathological traits which lead to criminality and viciousness, and if the rearing they receive in this environment is less likely to keep them from crime and vice than the one they would receive in a rural environment, the city furnishes a better breeding ground for the criminal and the vicious classes than the country. I shall discuss this subject in the chapter on juvenile criminality.

Furthermore, the immigration from the country to the city may swell somewhat the criminality of the city. A large part of this immigration is young. It probably represents on the whole the better portion of the rural population, because the more active and the more intelligent are most likely to go to the city. But since urban life is somewhat different from rural life, and involves difficult problems of adjustment, it is necessary for all of these immigrants to adjust themselves to the life of the city. Some of them, mostly of the weaker sort, though also including some of the stronger, will fail, and will join the ranks of the criminal and the vicious.

The reverse of this process is not so likely to happen. In the first place, the migration from the city to the country is usually not so great as in the opposite direction. In the second place, the urban immigrants to the country, while they may not prosper greatly, are not likely to become criminal and vicious, since the opportunities for crime and vice are not so numerous in the country.

So that this interchange of population between city and country is more likely to swell the criminality and viciousness of the city than that of the country. At any rate, that is more likely to be the immediate result. It is well to bear in mind that in the long run the rural immigration to the city may lessen the criminality and viciousness, since the immigrants who are successful in the city may do a good deal to check the forces for urban criminality and vice.

We have now considered a number of reasons for the assumed preponderance of crime and vice in the city, especially with regard to crime. Let us consider some of the reasons for the apparently larger amount of vice in the city.

The Organization of Vice in Cities

It is evident that it is more feasible to organize some of the vices in the city than in the country. For example, prostitution becomes highly commercialized in cities with an extensive system for procuring the supply of prostitutes and plenty of capital for the equipment of numerous houses of prostitution. Expensively furnished gambling houses are established with every possible means for gambling. Numerous saloons are established by the breweries to encourage men to drink, while numerous restaurants encourage both men and women to eat as well as to drink to excess.

The organization of vice is possible in the city because there are present, on the one hand, the vice enterprizer with plenty of capital, and, on the other hand, many customers. None of these are equally available in small communities, though it is probable that the enterprizer with his capital would almost always be on hand if there was sufficient demand for him. Furthermore, there are doubtless many small places in which there are enough would-be customers to make it worth while for the enterprizer. But vicious enterprizes are seriously handicapped in rural communities because secrecy is not so feasible as in the city. Inasmuch as these vicious practises usually labor under social, moral, and sometimes legal condemnation, most individuals do not want it generally known that they indulge in them. In a large city where most of the inhabitants are known each by only a few of his neighbors, it is usually feasible for an individual to carry on vicious practises without having it generally known. But in a small community where each inhabitant is known by most or all of the population, it is difficult for an individual to carry on many kinds of vicious practises, especially in a village or town where it is organized for the public. This is doubtless the principal obstacle in the way of much organized vice which would otherwise exist in small places.

This situation, which decreases the amount of organized vice

in the country, tends to increase it in the city. Many of those who are debarred by the lack of secrecy from indulging in vicious practises in small places come to the city for this enjoyment. So that in every large city vice is organized to a considerable extent to supply the demand of visitors, and each city is the center for the vicious activities of many of the inhabitants of the surrounding region.

Furthermore, the city furnishes special stimuli for vice. It is difficult for many urban inhabitants to secure healthful and normal forms of enjoyment. But all human beings crave a certain amount of pleasure, and the demand for pleasure is imperative in the case of the young. If normal pleasures are not available, both adults and youth are sure to adopt vicious forms of enjoyment. In the case of the young the lack of means of enjoyment is likely to lead to crime as well as to vice, in order to furnish the means of enjoyment. This is not so likely to happen to the adult who is not already a criminal, but the adult under these circumstances is sure to fall into vicious habits.

Another feature of the city which gives rise to a certain amount of vice is the nervous strain of urban life. In the city the individual is subjected to many stimuli which are very tiring to the nerves. Some persons will succumb to the temptation to sooth their nerves with drugs or to stimulate them with intoxicants.

I have indicated how poverty may lead to vice through lack of normal means of recreation. But wealth also may lead to vice, though in different ways and for different reasons. The ability to satisfy any desire however vicious belongs to the wealthy, while frequently a surfeit of normal pleasures creates a desire for abnormal and vicious pleasures. As the wealthy live in the large cities much more than in small places, wealth tends to swell vice in cities much more than in rural communities.

In connection with the subject of poverty and wealth as causes of vice it may be well to call attention to the fact that the economic struggle for existence is probably more bitter in the city than in the country. Under the present economic organization of society there emerge from this struggle, on the one hand, those who are successful and acquire great wealth, which leads to a certain amount of vice though not so much to crime, and,

on the other hand, the large number who are unsuccessful, whose poverty leads to much crime and vice.

Unorganized Vice in the Country

In this chapter I have described some of the factors for crime and vice in cities. In all probability there is more crime in urban than in rural communities. This, however, does not mean necessarily that the urban population is more criminal by nature than the rural population, for, as we have seen, it is due probably to peculiar features of the urban environment. There are also forces for vice in cities which do not exist at all or to the same extent in rural communities. However, it is by no means certain that there is more vice in cities than in the country. There may be, for reasons I have discussed, more organized vice in cities, but there may be as much or even more unorganized vice of the same kinds in the country. For example, gambling houses may not be found in rural communities, but there is much betting and petty gambling of various sorts. In fact, gambling may even become somewhat organized, as in connection with horse racing at the country fairs. Saloons may not be so common in the rural communities as in the cities, but there is a good deal of intemperance in rural homes nevertheless.

Furthermore, there are many vices which can be carried on in secret and not become publicly known like crime. There are also many vices which frequently pass unnoticed as such. It is obviously impossible to estimate the exact amount of unorganized vice in the country as compared with the city, but it is possible that there is as much or more of it in the country. Excessive and malicious gossiping, scandal mongering, backbiting, nagging, bigotry, unscrupulous cunning in commercial transactions, etc., should be rated as vicious, and it is very probable that the rural population with its narrower outlook and range of interests is more vicious in these respects than the urban population.

Influence of the Growth of Population upon Crime

Before closing this chapter I wish to point out the significance of the growth of population with relation to crime. If the population increases more rapidly than the production of wealth,

the standard of living falls, and poverty and its attendant evils increase. In other words, the economic welfare of the community diminishes. Inasmuch as the reproductive power of mankind is very great, it is the tendency of population to be pressing constantly upon the means of subsistence, and thus to increase economic misery. Consequently, rapid growth of population is likely to accentuate the economic factors for crime.

In another work I have discussed at considerable length the influence of the growth of population upon economic welfare,[1] and will, therefore, cite a few of the conclusions in that book: —

"In our modern civilized world there is needed on the whole, if not restriction of population, at any rate a greater moderation in the rate of increase than has been true during the past century. It may be possible to justify this upon the ground alone of the danger of reaching the ultimate limit of subsistence. But even if we grant that such a time is a long way off, so that it is not of practical importance now, other reasons for advocating such restrictions still remain. We have seen that it might be more feasible to remedy the distribution of wealth if population was not increasing so rapidly. But a more certain and obvious reason is that if the population were not increasing so rapidly, the general standard of living would be more likely to go up or to go up more rapidly, and while the poor might not benefit by this at once, or at any rate would not reach this standard at once, there would be more reason to hope that most if not all of them would attain it ultimately." (Pp. 177–178.)

"So that we should judge the increase of population with relation to two things, namely, the maintenance and progressive rise of the standard of living, and the diminution of poverty and its attendant evils. To do this we must keep constantly in mind the progress of the arts and sciences and the accumulation of capital, as well as the supply of natural resources. The increase of population furnishes a larger supply of labor. But if population increases faster than the amount produced can be increased with the aid of science and the use of capital, it is evident that the general standard of living must be depressed,

[1] *Poverty and Social Progress*, New York, 1916. See especially the chapters on "The Growth of Population and the Increase of Wealth," "Population and Poverty," and "The Raising of Wages and the Regulation of the Labor Supply."

and it will become increasingly difficult to lessen poverty while there will be great danger that it will increase. We shall be in a better position to abolish unemployment, sweating, and the other causes of poverty, if the general standard of living can be maintained and constantly raised." (P. 182.)

"The tendency of population is to increase more rapidly than it is the tendency of industry to expand, under the existing system of private industrial enterprize. Consequently, there is a large surplus of unemployed labor, and bitter competition among those at work tends to keep down the rate of wages. It is obvious, therefore, that, by eliminating this surplus and reducing the supply of labor in proportion to the other factors of production, unemployment can be prevented in large part, and the rate of wages can be raised.

"There are several ways in which this can be accomplished. The fundamental method is by the artificial control of the birth rate, which will prevent the supply of labor from increasing more rapidly than the other factors of production. We have already discussed the stupid and brutal restrictions upon the artificial control of births in this country and elsewhere. We have shown that these restrictions are based upon religious and moral prejudices and social and economic fallacies, which are probably fostered by those to whose interest it is to exploit the working class. Few changes could be of greater value to society at large and to the poorer classes in particular than the abolition of these restrictions and the widespread dissemination of the necessary knowledge for the artificial control of births. A characteristic feature of social progress and of cultural evolution is the increasing control by man of the forces which determine his welfare. One of the most important of these forces is the rate of increase of population. It is time for man to acquire control of this factor." (Pp. 372–373.)

CHAPTER VI

THE ECONOMIC BASIS OF CRIME

The economic struggle for existence — Economic changes and crime: seasonal fluctuations; the trade cycle; prices; wages — The economic crimes: crimes against property — The economic status of the criminal — Economic classification of criminals — Occupational distribution of criminals — Professional criminality — Influence of economic organization upon crime — Poverty and crime — The standard of living and crime — Wealth and crime and vice.

LIKE every other animal species mankind is engaged in a struggle for existence. This is true both of the human species as a whole and also of individual human beings amongst themselves. But cultural evolution has given the human struggle for existence an unusually specialized and complex form.

THE ECONOMIC STRUGGLE FOR EXISTENCE

Owing largely to the invention and use of tools, there has developed a highly differentiated system of division of labor. This in turn has led to a complex system of exchange. As a consequence most human beings do not produce what they consume, but receive their subsistence indirectly from the producers. Furthermore, the correlated systems of the division of labor and of exchange have resulted in the formation of social groups and classes whose status and traits are determined mainly by their functions in the economic system. The human struggle for existence has therefore become in large part an economic struggle, that is to say, a struggle to obtain the commodities needed and desired within the system of production based upon the division of labor and exchange. This struggle, though it becomes more complex and indirect in its character, is no less bitter than it is among many animal species, and is as all-pervasive. It touches upon and influences every important aspect of the life of mankind. It is of special significance with respect to criminal activity, for some of this activity doubtless

arises directly out of the economic struggle, while most if not all of it is conditioned by the economic environment.

There has been much difference of opinion as to the influence of economic forces upon crime. Some have thought that crime is due entirely to economic factors. Others have asserted that economic conditions have little or nothing to do with the causation of crime. As a matter of fact, it is a difficult problem to solve on account of the complexity of the factors involved. These include the forces of the physical environment (climate, season, topography, etc.), the biological factors, and the social factors, such as the economic and the political. To disentangle these different categories of forces and appraize accurately their relative influence in the causation of crime is a difficult if not an impossible task.

The criminality of any time and place is conditioned and to a certain extent determined by the existing economic system. Where the methods of production are not highly developed, so that the wealth of the community is limited, the living conditions will be of the rude sort which are likely to encourage crimes against the person. As the methods of production become more complex and wealth increases, more crimes against property become possible.

We are interested in ascertaining the direct and immediate influence of economic forces upon criminality. Several methods may be used in studying this problem. In the first place, we may correlate fluctuations in the amount of crime with economic changes. In the second place, we may study the economic crimes, namely, the crimes in which economic motives are obviously or apparently predominant. In the third place, we may study the economic status of the criminal, namely, the economic classes with respect to the distribution of wealth and the occupations to which they belong. In the fourth place, we may study professional criminality, namely, the criminality of those who make the committing of crimes a profession and occupation. In connection with these methods of studying the problem we shall have occasion to study various economic phenomena and conditions, such as the extreme variations in the distribution of wealth, the economic pressure due to poverty as leading to crime in the effort to avoid starvation or to secure a higher standard of living, unemployment, low wages, mendi-

cancy, vagrancy and other forms of dependency as leading to crime.

Economic Changes and Crimes

In Chapter IV it has been shown that while crimes against the person increase with the seasonal rise in temperature, crimes against property increase with the seasonal fall in temperature. Consequently, the largest number of crimes against property take place during the winter months, while the largest number of crimes against the person take place during the summer months. I have already presented some statistics with respect to these seasonal fluctuations, and will now present a few more with respect to the seasonal fluctuations in the number of crimes against property.

Lacassagne has prepared a criminal calendar which shows the seasonal distribution of crimes in France: — [1]

Seasonal Distribution of Crimes Against Property in France, 1827–1870

Number of Crimes Against Property for Each Month, Reduced to an Equal Duration of 31 Days

January	16,350
February	15,400
March	14,250
April	13,450
May	13,625
June	13,450
July	13,225
August	13,425
September	13,875
October	14,400
November	16,100
December	*16,825*

The above table indicates that the number of crimes against property in France is highest in the following order during the months of December, January, November, February, October, and March; and is lower during the remaining months of the year. In other words, crimes against property are more numerous during the autumn and winter than they are during the

[1] A. Lacassagne, *Marche de la criminalité en France de 1825 à 1880*, in the *Revue scientifique*, May 28, 1881, pp. 674–684.

spring and summer. The average for the summer months is 13,367, for the spring months is 13,775, for the fall months is 14,792, and for the winter months is 16,192, thus showing a steady increase from the hottest to the coldest season.

The following table indicates the seasonal distribution of certain crimes against property in Germany: — [1]

SEASONAL DISTRIBUTION OF CRIMES AGAINST PROPERTY IN GERMANY

Daily averages for each month if the daily average for the year were 100

Crimes	*Years*	*Jan.*	*Feb.*	*Mar.*	*April*	*May*	*June*	*July*	*Aug.*	*Sept.*	*Oct.*	*Nov.*	*Dec.*
Simple theft	1883–92	113	115	98	85	87	88	88	92	92	106	117	*121*
Aggravated theft	1883–92	102	107	92	89	94	98	98	96	94	106	*112*	111
Embezzlement	1886–92	100	97	94	94	98	100	103	101	98	104	105	*108*
Robbery	1886–92	100	87	78	84	94	98	99	106	84	120	*132*	116
Receiving stolen goods	1883–92	123	122	103	82	82	83	80	81	81	100	120	*142*
Fraud	1888–92	107	111	94	89	90	95	95	91	90	102	116	*120*

How then is the preponderance of crimes against property during the colder months of the year to be explained? The first explanation which may occur to the reader is that the lower temperature stimulates the propensity to thieving and like crimes. There is probably a slight amount of truth in this explanation. It is very likely that the stimulating effect of cold leads to greater criminal activity, just as it leads to greater non-criminal activity. But this phenomenon is doubtless to be accounted for in the main by the economic conditions which prevail during the colder months. In several of the seasonal occupations there is little activity during the colder months of the year. Among these are agriculture, the building trades, etc. There are, to be sure, some seasonal occupations which are more active during the colder months. But there appears, on the whole, to be more activity and more work available during the warmer months than there is during the colder months. The statistics with regard to employment indicate that there is more unemployment during the colder months, and especially towards the end of the colder months, than there is during the warmer months.[2]

On the other hand, human demands and desires increase

[1] *Statistik des Deutschen Reichs*, Neue Folge, Band 83, *Kriminalstatistik für das Jahr 1894*, Berlin, 1898, II, 53.

[2] I have presented some of these statistics in my *Poverty and Social Progress*, New York, 1916, Chap. IX.

considerably during the colder months. More food, clothing, and shelter are needed, while it is probable that the amusements desired in winter are more costly than those desired in summer. So that it is practically certain that the preponderance of crimes against property during the colder months is due mainly to greater destitution, on the one hand, and to a higher degree of economic pressure to expend, on the other hand.

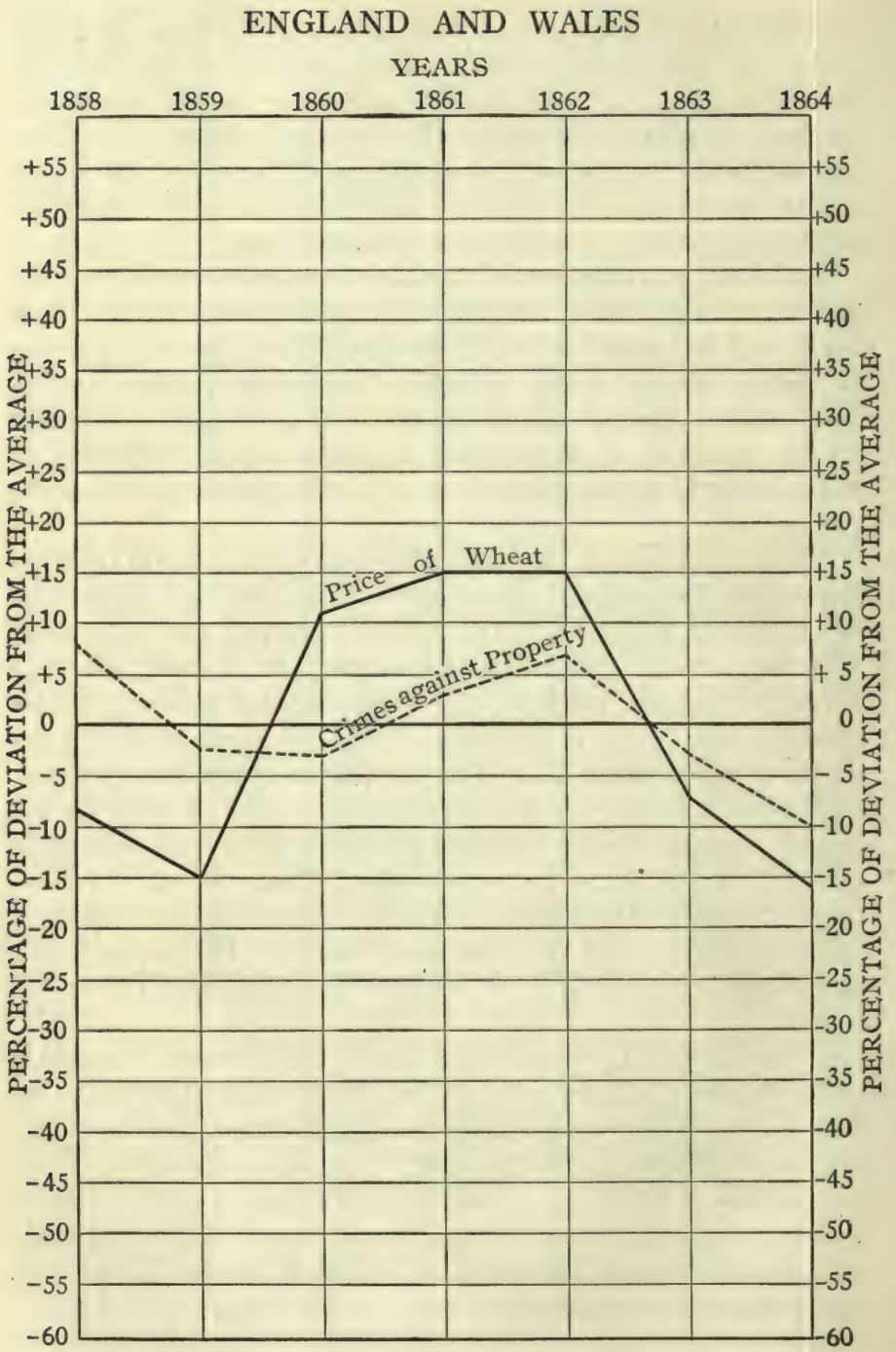
But much more extensive than the seasonal economic changes are the changes that take place in connection with the trade cycle, and in connection with industrial evolution which is due to improvements in the methods of production. The correlation between these economic changes and criminality is revealed by the statistics of fluctuations in prices and the statistics of the number of crimes committed or of the number of criminals convicted.

The accompanying charts indicate direct correlation between the prices of wheat and crimes against property in England and Wales and in France, and the prices of rye and convictions for theft in Russia.[1] These charts indicate that in these countries there is a general tendency for crimes against property to increase as the prices of cereals rise, and for these crimes to decrease as these prices fall. The correlation is not always exact, and there is frequently a noticeable lag, but this is to be expected since it usually requires a little time for the economic changes to influence the criminality. Many more statistics could be cited which show that the same situation exists in other countries, and there is good reason to believe that this correlation exists with a fair degree of regularity all over the world.[2]

It would also be possible to show that inverse correlation exists between changes in wages and crimes against property, so that as wages rise these crimes tend to decrease, and as wages fall these crimes tend to increase. But this correlation is not as close or as apparent as the direct correlation between these crimes and prices, because wages change more slowly than prices, and therefore cannot have so much effect at any one time upon the extent of criminality.

[1] The tables from which these charts are plotted are given in Appendix A.

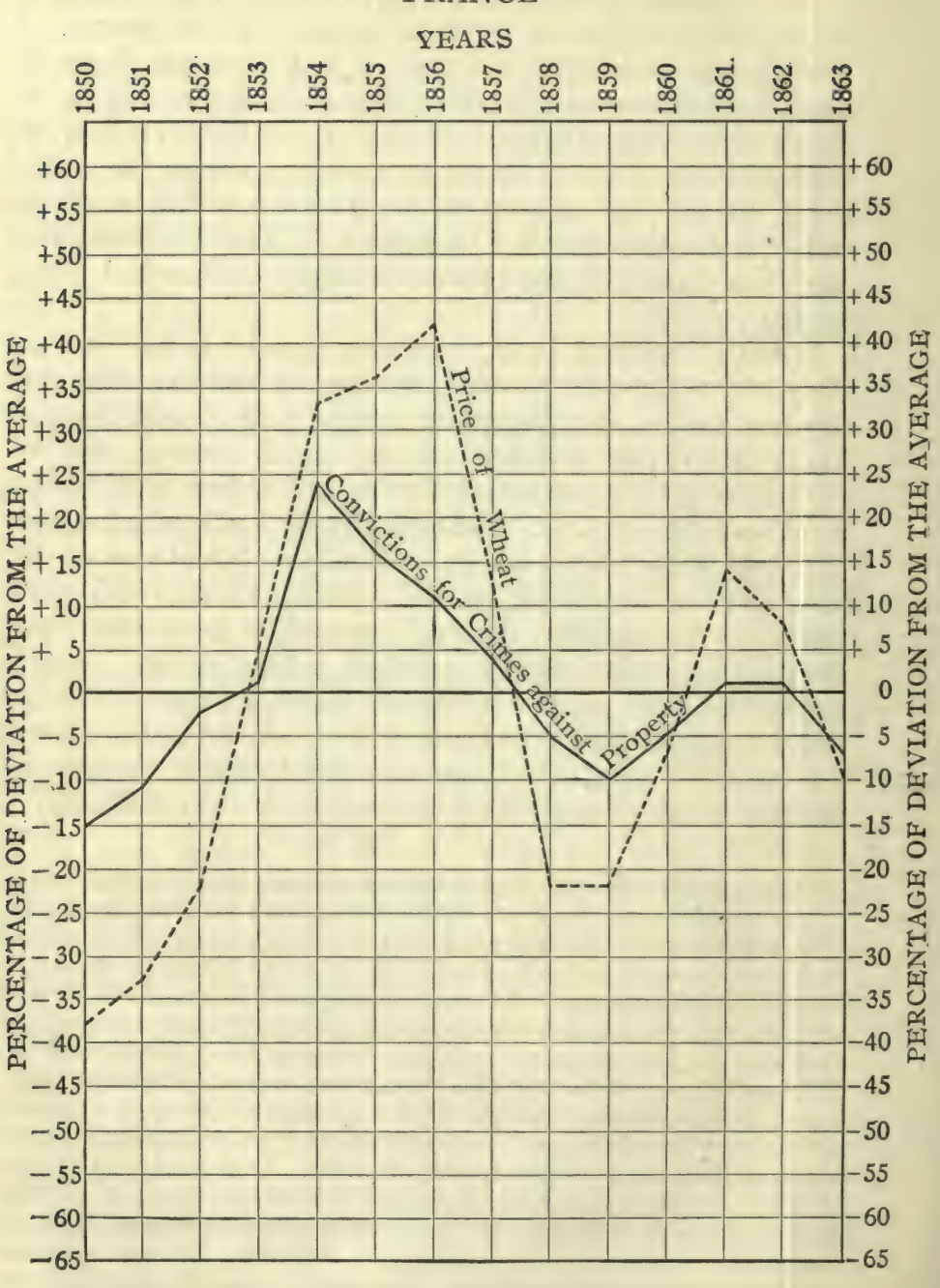
[2] Many of these figures are cited in W. A. Bonger, *Criminality and Economic Conditions*, Boston, 1916.


ENGLAND AND WALES
YEARS
1858
1859
1860
1861
1862
1863
1864
+55
+50
+45
+40
+35
+30
+25
+20
+15
+10
+5
0
-5
-10
-15
-20
-25
-30
-35
-40
-45
-50
-55
-60
PERCENTAGE OF DEVIATION FROM THE AVERAGE
Price of Wheat
Crimes against Property

Now changes in prices and wages usually cause changes in the economic welfare of the great majority of the people. A rise in prices, especially in the prices of such articles as the staple foods, is almost certain to raise the cost of living for the poorer classes, since wages do not ordinarily rise as fast as prices. In similar fashion a fall in wages may cause a rise in the cost of living, though this happens rarely, since prices fall usually as fast or faster than wages. These facts indicate, therefore, that there is a causal relation between economic welfare and crimes against property.

It would, however, be a mistake to assume, as has been assumed by some writers, especially among the socialists, that this criminality is determined entirely by these economic factors. Many factors play a part in causing crime. Among these are the telluric factors, the organic factors, and various social factors apart from the economic. We have already studied the influence of several of the telluric factors, such as climate and season. We have noted a correlation between seasonal changes and criminality which, however, does not necessarily mean that criminality is determined entirely by these telluric factors. In similar fashion there exists a correlation between economic changes and criminality which indicates that, while the other factors are relatively constant, changes in the economic factors are bringing about corresponding fluctuations in the criminality.[1]

[1] Van Kan has stated this idea clearly and precisely in the following words: "La criminalité suit avec une régularité frappante la courbe des fluctuations économiques, et ce, non pas parce que le crime est le produit exclusif du facteur économique, mais en raison de ce que, précisement, parmi tous les facteurs criminogènes, le facteur économique est le plus mobile, le plus variable et le plus exposé à des oscillations annuelles et qu'il exerce partout l'influence la plus apparente et la plus soudaine sur le mouvement des phénomènes qui se rattachent à lui. Les autres facteurs qui agissent sur les délits, facteurs d'ordre organique, d'ordre cosmique et tellurique et d'ordre social, non économique, sont, de nature, sujets à des changements annuels restreints et lents, et, partant, peu apparents. Leur courbe est presque rectiligne. Donc la courbe correspondante de la criminalité que la première courbe tient sous sa dépendance, ne manifeste non plus que des variations insensibles et demeure presque identique à elle-même, d'année en année. Ce sont les oscillations économiques, capricieuses et brusques, qui constituent dans la courbe de la criminalité l'élément perturbateur et provoquent les différences qu'on y remarque d'une année à l'autre." (J. van Kan, *Les causes économiques de la criminalité*, Paris, 1903, p. 11.)


FRANCE
YEARS
1850
1851
1852
1853
1854
1855
1856
1857
1858
1859
1860
1861.
1862
1863
PERCENTAGE OF DEVIATION FROM THE AVERAGE
+60
+55
+50
+45
+40
+35
+30
+25
+20
+15
+10
+ 5
0
− 5
−10
−15
−20
−25
−30
−35
−40
−45
−50
−55
−60
−65
Price of Wheat
Convictions for Crimes against Property

These economic changes are due in part to telluric forces which determine the size of the crops, etc., and in part to the economic and political organization of society which leads to the fluctuations, sometimes almost catastrophic in their character, of the trade cycle. They give rise to changes in the extent of crime in various ways. Generally speaking it may be said that these changes are due to variations in the purchasing power of the great majority of the population which modify the economic pressure to commit criminal acts.

The Economic Crimes

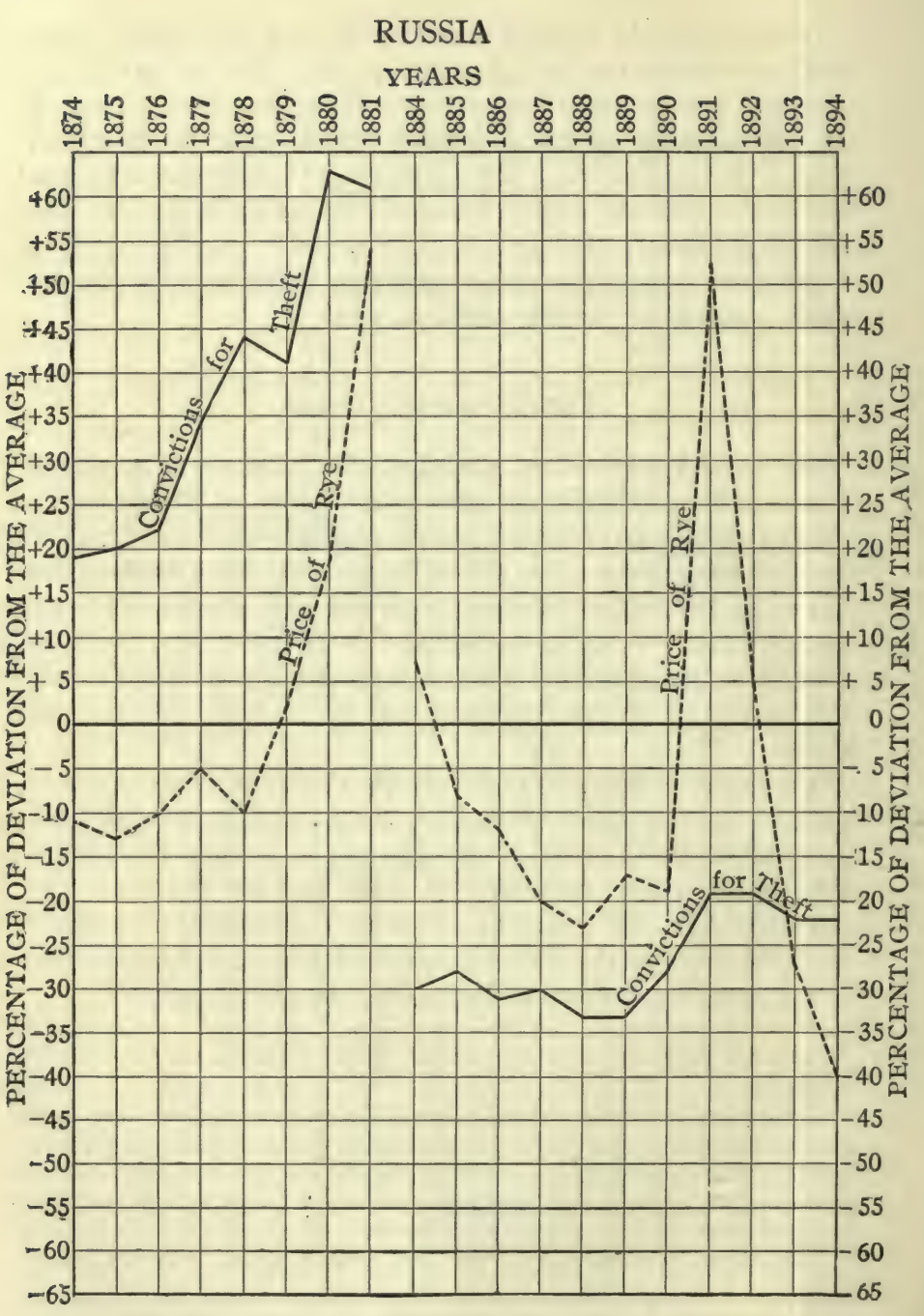
The second method of studying the influence of economic factors upon criminality is to ascertain which of the crimes are due in the main to economic forces, and may therefore be called the economic crimes. It is generally assumed that crimes against property are due to economic motives, and are therefore economic crimes. Roughly speaking this is true. But there are some exceptions to this rule, and there are a good many crimes which are due in part to economic forces but also to other forces.

It is not easy to measure accurately the influence of economic forces in the causation of any kind of crime. Fornasari di Verce has made a careful study of the influence of economic conditions and changes upon criminality in Italy between the years 1873 and 1890. In the following table he indicates the extent to which he believes the different kinds of crimes to be influenced by the economic welfare of those who commit them: — [1]

Tarde has expressed a similar thought from a conservative point of view as follows:

"En somme, la criminalité et la moralité d'un pays tiennent bien moins à son *état* économique qu'à ses *transformations* économiques. Ce n'est pas le capitalisme comme tel qui est démoralisateur, c'est la crise morale qui accompagne le passage de la production artisane à la production capitaliste, ou de tel mode de celle-ci à tel autre mode." (G. Tarde, *La criminalité et les phénomènes économiques*, in the *Arch. d'anth. crim.*, Vol. XVI, 1901, p. 568.)

[1] E. Fornasari di Verce, *La criminalità e le vicende economiche d'Italia*, Turin, 1894, p. 138.


RUSSIA
YEARS
1874
1875
1876
1877
1878
1879
1880
1881
1884
1885
1886
1887
1888
1889
1890
1891
1892
1893
1894
PERCENTAGE OF DEVIATION FROM THE AVERAGE
+60
+55
+50
+45
+40
+35
+30
+25
+20
+15
+10
+ 5
0
- 5
-10
-15
-20
-25
-30
-35
-40
-45
-50
-55
-60
-65
Convictions for Theft
Price of Rye
Price of Rye
Convictions for Theft

Crimes	Subject to the Influence of Economic Welfare (*vicende*) [1] and Varying with It	Inversely	Much.	1. Thefts of all kinds.
				2. Embezzlement, cheating, and other frauds.
				3. Crimes against property coming before the magistrate (excepting rural thefts, included under 1).
				4. Commercial crimes (excepting fraudulent bankruptcy).
			Moderately.	5. Blackmail, extortion, and robbery.
				6. Crimes against the order of the family.
				7. Crimes against persons coming before the magistrate.
				8. Crimes against the public order.
			Little.	9. Crimes against the public administration (excepting rebellion and violence to public authorities).
				10. Forgery and counterfeiting.
		Directly	Crimes over which the Influence of Alcohol is Predominant.	I. Assault and extortion with homicide.
				II. Rebellion, and violence to the public authorities.
				III. Homicide of every kind.
				IV. Assaults and intentional injuries.
				. . . Sexual crimes.
	Subject to the Influence of Economic Occurrences		Hardly at All.	11. Attacks upon the safety of the state.
				12. Perjury, slander, etc.
				13. Fraudulent bankruptcy.
			Not at All.	14. Insults, and defamation of character.
				15. Crimes against religion.
				16. Arson and malicious mischief.

Fornasari di Verce has made a similar study of the influence of economic conditions and changes upon criminality in Great Britain between the years 1840 and 1890, and in New South Wales between the years 1882 and 1891. In the following table he gives the results of this study for Great Britain: — [2]

[1] I have translated the word "*vicende*," which literally means "vicissitudes" or "changes," by the word "welfare," because this word seems to express most accurately the author's meaning at this point.

[2] *Op. cit.*, p. 202.

Crimes and Misdemeanors	Subject to the Influence of Economic Welfare (*vicende*) and Varying with Them	Inversely	Much.	Crimes against property without violence.
			Moderately.	Crimes against property with violence.
			Little.	Crimes against property with premeditated destruction.
				Crimes other than those named above and those against persons and against the currency.
		Directly	Crimes over which the Influence of Alcohol is Predominant.	Crimes against persons.
	Subject to the Influence of Economic Occurrences		Not at All.	Misdemeanors and contraventions.
			Only slightly.	Forgery and counterfeiting.

These tables indicate that economic pressure tends, generally speaking, to increase crimes against property more than crimes against the person. This merely confirms what we have already learned from the correlation between fluctuations in prices and wages and changes in the extent of criminality.

The following table indicates the percentage of economic crimes as compared with other kinds of crimes in several countries: — [1]

	Economic Crimes	*Sexual Crimes*	*Crimes of Vengeance* *	*Political Crimes*
Germany, 1896–1900.....	41.89	1.32	56.67	0.12
England, 1881–1900.....	36.78	0.63	62.59	0.00
France, 1881–1900.....	60.09	1.59	38.32	0.00
Italy, 1891–1895.....	46.75	1.57	51.68	0.00
Netherlands, 1897–1901...	42.12	0.84	57.04	0.00

* In this class are included such crimes as insults, malicious mischief, arson, assaults, homicide, etc.

We can see from the above table that the so-called economic crimes in which economic factors predominate constitute from two to three-fifths of the total number of crimes.[2] Furthermore,

[1] Summarized and adapted from W. A. Bonger, *op. cit.*, pp. 538–542.

[2] According to the U. S. Census of 1910, the offenses for which persons were committed to penal institutions during the year 1910 were distributed as follows:

we have reason to believe that economic factors play at least a small part in the causation of many of the other crimes.

Sexual crimes are due in part to economic factors, such as the economic difficulties in the way of marrying in early youth, the economic dependence of woman, intemperance stimulated by poverty, etc.

I have already stated that crimes against the person tend to increase with economic prosperity and vice versa. This fact suggests that economic factors have some influence upon these crimes. It is probably to be explained by the fact that in times of prosperity men come together more frequently for purposes of amusement, and in the present crude state of civilization they are prone to amuse themselves by an intemperate use of alcohol and by other riotous forms of conduct which are likely to lead to personal encounters, and thus to crimes against the person.

It is impossible to measure accurately the influence of the economic factors in the causation of these crimes against the person. But the above considerations and many others which might be named indicate that they should be given some

PRISONERS AND JUVENILE DELINQUENTS COMMITTED IN 1910

Offense	*No. of Offenses*
All offenses	493,934
Offenses against the person	30,411
Gainful offenses against property	67,557
Other offenses against property	10,641
Offenses against chastity	13,944
Offenses against the administration of government	2,456
Offenses against public health and safety	14,637
Offenses against sobriety and good order	313,406
Offenses against public policy	18,372
Offenses against prisoner's family	3,666
Offenses peculiar to children	7,803
Miscellaneous groups	11,041

According to this table, crimes against property constituted less than one-sixth of the offenses for which commitments were made. But it will be noted that more than three-fifths of the total number of offenses were offenses against sobriety and good order, which include drunkenness, disorderly conduct, vagrancy, etc. Most if not all of these petty offenses are omitted from the European figures given above. So that if we omit these minor offenses, the crimes against property constitute nearly one-half of the offenses which remain.

weight.[1] The same is true of political crimes which, while they are few in number, are of great significance. Many of these crimes are committed because of existing economic conditions and in an effort to change these conditions.

The Economic Status of the Criminal

The third method of studying the influence of economic forces upon crime is to investigate the economic status of the criminal. This may be accomplished by ascertaining the economic classes with respect to the distribution of wealth to which criminals belong, and by ascertaining the occupations to which they belong.

It is a well known fact that the majority of the criminals belong to the poorer classes. But it is also true that the majority of the total population belongs to these classes. So that it is necessary to ascertain whether the percentage of criminals from these classes is larger than the percentage which these classes form of the total population. This is a difficult matter to determine on account of the paucity of accurate data.

One of the few computations of this sort has been made by Fornasari di Verce.[2] Taking the statistics from the Italian census of 1881, he grouped together the occupations consisting mainly of the rich, the well-to-do, the moderately well-to-do, and those with enough to live comfortably, and found that they contained 390.66 out of every thousand persons of both sexes over nine years of age in Italy; while the occupations consisting mainly of the poorer classes, having scarcely enough to live on, contained 609.34 out of every thousand persons of both sexes over nine years of age.

From the Italian judicial, penal statistics he ascertained that persons convicted of crime during the years 1887, 1888, and 1889, were distributed according to their wealth or poverty as indicated in the following table: —

[1] Bonger, who as a socialist gives excessive weight to the influence of economic factors, expresses the opinion that the principal causes of crimes against the person are "first, the present structure of society, which brings about innumerable conflicts; second, the lack of civilization and education among the poorer classes; and third, alcoholism, which is in turn a consequence of the social environment." (W. A. Bonger, *op. cit.*, p. 643.)

[2] E. Fornasari di Verce, *op. cit.*, pp. 3–4.

ECONOMIC CLASSIFICATION OF PERSONS CONVICTED OF CRIME IN ITALY

The Economic Classes	*Percentage of Distribution* 1887	1888	1889
Indigent	56.34	57.45	56.00
Having only the bare necessities	29.99	30.77	32.15
Moderately well-to-do	11.54	9.98	10.13
Well-to-do or rich	2.13	1.80	1.72
	100.00	100.00	100.00

The economic classification used in this computation is necessarily arbitrary, and doubtless leads to some error. But so far as this computation can be relied upon, it indicates that while about 60 per cent. of the total population belong to the poorer classes in Italy, about 85 to 90 per cent. of the convicted persons belong to these classes.

More statistics might be cited all of which indicate that the poorer classes are proportionally much more criminal than the richer classes.[1] This suggests a correlation between poverty and criminality similar to the correlations we have already found between certain other economic forces and conditions and criminality. It suggests that poverty is a cause of criminality. This is contended by some writers, especially the socialist writers. On the other hand, it is denied by some writers on the ground that both poverty and criminality are due to weaknesses of character in the individual, so that they are common results of the same cause, but not causes of each other. Some of those who deny this theory of poverty as a cause of crime regard these individual weaknesses as defects of character for which the individual is to blame from a moral or religious point of view. Some of the writers who deny this theory are criminal anthropologists or other scientists who regard these weaknesses as abnormal and pathological traits for which the individual is not to blame in any moral or religious sense. This is a difficult problem which can be solved only by means of a study of the economic organization of society, which I shall discuss later in this chapter.

OCCUPATIONAL DISTRIBUTION OF CRIMINALS

The occupational distribution of criminals throws a good

[1] Some of these statistics are to be found in W. A. Bonger, *op. cit.*, pp. 436–439.

deal of light upon their economic status. The following table gives this distribution for Germany during the years 1890 to 1894: — [1]

OCCUPATION AND CRIMINALITY IN GERMANY, 1890–1894

Of 100 Persons Convicted of Crime there Belonged to the Following Occupations		To 100 Adults of the Total Population there were in 1895 (*Statistics of the German Empire*, Vol. III)	
Agriculture, Forestry, Hunting, and Fishing	Independent	4.7	7.0
	Assistants	18.9	15.6
	Relatives	2.3	1.21
Industries, Mining, and Building Trades	Independent	6.4	5.6
	Assistants	30.4	17.0
	Relatives	4.4	14.5
Trade and Commerce, including Hotels and Public Houses	Independent	5.7	2.3
	Assistants	5.8	4.1
	Relatives	1.2	4.6
Public and Court Service, Liberal Professions	Actively Engaged	1.3	2.2
	Relatives	0.17	1.8
Domestic Servants	Actively Engaged	1.6	4.3
	Relatives	0.02	0.2
Workmen, Trade not given	Actively Engaged	10.4	0.6
	Relatives	1.8	0.4
Without Occupation, and Occupation not given	Independent	4.6	5.8
	Relatives	0.27	1.9

The following table gives the occupational distribution in Italy during the years 1891 to 1895: — [2]

OCCUPATION AND CRIMINALITY IN ITALY, 1891–1895

Groups of Occupations	*Convicts Annual Average to 100,000 of each Group of Occupations*
Agriculture	1,009.03
Manufacturing, arts and trades	855.78
Commerce, transport, navigation and fishing	1,677.46
Domestic service	410.96
Employees, liberal professions, capitalists, pensioners	288.58

[1] Adapted from a table in G. Aschaffenburg, *Crime and Its Repression*, Boston, 1913, p. 66. The figures are taken from the *Statistik des Deutschen Reichs*, Neue Folge, LXXXIX, II, p. 48.

[2] Cited in W. A. Bonger, *op. cit.*, p. 446, from the Italian judicial and penal statistics. As the calculations are based upon the census of 1881, the table is rather inaccurate.

The last table seems to indicate that criminality is very prevalent in the commercial occupations, is moderately prevalent in agriculture, manufacturing and the trades; but is low among domestic workers, and is very low in the liberal professions. But this table is misleading in certain respects, as is indicated by the preceding table which furnishes the facts in greater detail. According to that table, in Germany in the agricultural group criminality is high among the employees, but is low among the employers. In other words, the farmer who owns his farm is not likely to become criminal, but the farm laborer who hires out his services is much more likely to become criminal. In similar fashion, in the industrial group the employees are much more criminal than the employers. In the commercial group, on the contrary, the independent commercial workers seem to be far more criminal than the commercial employees. The high figure for the independent commercial workers is probably due to the fact that there are many small merchants and petty tradesmen who are prone to commit certain kinds of crimes. For example, according to the German statistics upon which the table in question is based 59.8 per cent of the usurious offenses were committed by this group, despite the fact that this group contained only 2.3 per cent of the total population. Other crimes which are common in this group are fraud, perjury, receiving stolen goods, etc.

Both of the above tables indicate that criminality is not prevalent in domestic service and in the liberal professions. The low percentage of crime among domestic servants is probably due to the fact that they are usually well cared for in the homes of their employers, and are not subjected to as many temptations to commit crimes as persons engaged in most of the other occupations.[1] The low percentage of crime in the liberal professions is doubtless due to the facts that those engaged in these professions are usually well educated, and are economically at least moderately well-to-do.

The occupational distribution of criminals also seems to reveal the pressure of poverty and other forms of economic hardship as causes of crime; though here again it may be true,

[1] The above statistics and many others like them show how erroneous is the exaggerated estimate of the extent of crime among female domestic servants in R. de Ryckère, *La servante criminelle*, Paris, 1908, p. 2.

as I have mentioned above, that crime and poverty are results of a common cause and are not causes of each other. By means of an intensive study of each occupation it would be possible to show how it gives rise to specific forms of criminality, and how each occupation is more or less characterized by certain kinds of criminality.[1]

Professional Criminality

The fourth method of studying the influence of economic factors which I shall use is by means of investigating professional criminality, namely, the criminality of those who make of the committing of crimes a profession and an occupation. It is evident that in professional criminality the economic motive is predominant, since the criminal is making his livelihood entirely or in part illegally in a criminal career, just as other persons gain their livelihoods legally in non-criminal ways.

It is impossible to estimate with any degree of accuracy the extent of professional criminality. On account of their greater skill as criminals, in all probability more of the professional criminals escape punishment than of the other types of criminals. For example, mentally defective and insane criminals, and criminals by passion are much more likely to get caught than professional criminals. On account of their lack of experience occasional criminals are more likely to get caught than professionals. Some of these occasional criminals with further experience become professionals.

We have, therefore, reason to believe that the number of professionals in prison at any time constitutes only a part, and perhaps only a small part, of the total number of criminals of this type.[2] If we bear in mind that a considerable proportion,

[1] "Le crime professionel des sages-femmes: c'est l'avortement; celui des agents de change: la fraude et l'usure; celui des magistrats: la partialité; celui des hommes politiques: la corruption; celui des publicistes: la calomnie." (E. Laurent, *Le criminel*, Paris, 1908, p. 125.)

[2] The notorious French professional criminal, Leblanc, testified as follows with regard to the number of professionals in prison: "I know very well that we have risks to run, that the police and the courts are at hand, that the prison is not very far distant; but out of eight thousand thieves in Paris, you never have more than seven or eight hundred in jail; that is not a tenth of the whole. We enjoy, then, on the average, nine years of liberty to one

perhaps as many as half of those in prison, are professionals, we can readily see that the total number must be very large. Several comments should be made which are of significance in this connection.

In the first place, as I have already had occasion to remark, a good many crimes such as petty thefts are committed which never become known, either because the loss is never discovered or because it is not recognized as a theft. In the second place, a good many crimes become known for which no one is tried because no evidence can be found.[1] In the third place, a considerable proportion of the cases which come before the criminal courts end in dismissal or acquittal. In many of these cases a crime has unquestionably been committed. In the fourth place, in a few cases in which both the crime and the criminal are known the case never comes into court because the victim refuses to make a complaint, either in order to avoid the annoyance of having to testify, or out of a kindly feeling towards the offender.

In the last type of case mentioned the offender may be a servant or employee whom his master or employer does not want to prosecute. But in all of the other cases the criminal is likely to be a professional who is escaping detection and punishment through his skill as a criminal. It is true that some of those who may be called professional criminals are very stupid and are frequently caught. They are usually on the borderline between the professional and the mentally defective criminal. But the higher type of professional criminal who is skillful as a criminal, though he may not be skillful in any other way, is responsible for a considerable proportion of the crimes committed, and yet escapes punishment much of the time.

Economic factors are doubtless very powerful in creating the professional criminal. Some of these criminals, perhaps many of them, possess weaknesses and defects of character which have played some part in leading them into criminal careers. Economic and other social forces may have been the sole causes

in prison." (M. Girguet, *Mémoires*, Paris, 1840. Quoted in W. A. Bonger, *op. cit.*, p. 586.)

[1] See G. Tarde, "*Les délits impoursuivis*," in his *Essais et mélanges sociologiques*, Lyons, 1895.

of the criminality of other professional criminals. But even in the cases where defects of character are partly responsible, economic forces also are almost invariably at work, and in many of these cases better economic conditions would have restrained the defects of character from giving rise to criminality.

To put it still more concretely, it is economic pressure in early youth in the form of a struggle for subsistence or for a higher standard of living, and resulting usually in inadequate intellectual and moral training and association with bad companions, which forces or, to say the least, leads many of these professional criminals into their first crimes. Many of these would never pass beyond occasional criminality were it not for the corrupting influence of the prisons, most of which are training schools for crime and make many of these beginning criminals into full-fledged professionals.[1]

Influence of Economic Organization upon Crime

We have now studied the influence of economic forces upon criminality by correlating economic changes as revealed by fluctuations in prices and wages with changes in the extent of criminality, by ascertaining what crimes are apparently immediately due to economic motives, by ascertaining the economic class and occupation of the criminals, and by investigating criminality as an occupation and profession. All of these methods of study have shown that the influence of the economic factors is very great, though it is impossible to measure it ac-

[1] Bonger characterizes the etiology of the professional criminal as follows: "Except for a few subsidiary circumstances the life of the professional criminal may be summed up as follows. With very rare exceptions he springs from a corrupt environment, perhaps having lost his parents while still very young, or having even been abandoned by them. Being misled by bad company, he commits an 'occasional' theft while still a child, for which he must pay the penalty of an imprisonment; he may at times owe his entrance into prison to a non-economic misdeed. This, however, is a very rare exception. As we have remarked above, prison never improves him, and generally makes him worse. If he is in contact with the other prisoners, among whom there are naturally a number of out and out criminals, he hears the recital of their adventurous life, learns their tricks and all that he still needs to know to be thoroughly informed as to 'the profession.' Nor will the separate cell be any more profitable to him, brutalized as he already is by his earlier environment." (W. A. Bonger, *op. cit.*, p. 581.) As a socialist Bonger fails to give sufficient weight to defects of character.

curately at any point. It will, nevertheless, be worth while, before closing this chapter, to survey briefly the economic organization and condition of society in order to characterize and estimate in a general way these economic forces for crime. I have discussed this subject at length in another work from which I will reproduce the following passages:

"Perhaps the most striking feature of the existing economic organization of society is that under the régime of private business enterprize the greater part of the means of production is owned by a comparatively small number of individuals, while the immediate control of most economic activities is in the hands of a still smaller number of individuals. The result is that most of the workers are put at a decided disadvantage in securing their share of the amount produced by society. Since the beginning of the modern industrial organization, and perhaps for a much longer period, the workers have not been able to influence to any great extent their share in the distribution of wealth. This has been determined by such factors as the richness of the natural resources, the density of the population, the accumulation of capital, the form of business enterprize, etc.; all of which are factors over which they have had little or no immediate control. In view of this fact it is not surprizing that there is the great inequality in the distribution of wealth and the enormous concentration of wealth in the hands of a few which we have discussed in an earlier chapter.

"Another significant feature of modern economic organization is the great instability of industry. The principal illustration of this instability is to be found in the alternation between the periods of depression and of prosperity which takes place in the trade cycle. But at all times there is more or less instability, since industrial concerns are failing, or are overproducing and thus preparing to fail. The fundamental cause for this instability is the difficulty of obtaining an adjustment between the supply of and the demand for economic goods. Now it goes without saying that this difficulty has always existed, and always will exist to a certain extent. But in the past society was organized in the main in small communities which were more or less self-sufficing economically. Consequently, producers were in close touch with the consumers of their products, and could adjust their output more or less accurately to the

demand. Under the present large scale, machine system of production it takes a great deal of capital to start most industrial enterprizes, and in many cases takes the producers a long time to discover the nature and extent of the demand for their goods. Consequently, the chances for overproduction and for business failure are greatly increased. The results are a vast amount of unemployment for the workers, and bankruptcy for many capitalists and enterprizers.

"Another cause of poverty which should be prevented as far as possible is the waste of economic goods. Whether or not there is proportionately more waste now than there has been in the past, it would be difficult to determine. But it is not important for our purpose to decide this question. What is important is to determine the causes of waste, and to discuss how they may be removed. It is evident that the instability of industry mentioned above causes a great deal of waste, through the loss of labor force and the dissipation of capital. A good deal is wasted through excessive luxury and extravagance in consumption. Advertizing constitutes an enormous waste in modern society, while the middlemen and hangers-on of our industrial system cause still more waste. Many more forms of waste might be enumerated had we the space to do so.

"The amount produced by society could be greatly increased if the efficiency of the workers were improved. By means of vocational training, scientific management, etc., workers could be distributed in industry more nearly in accordance with their natural aptitudes, and would be far more efficient because they would do their work by means of scientific methods. But to increase the efficiency of the worker is not sufficient if he is not given an opportunity to work. It would also be necessary to increase the opportunities for production, so that all of the human talent available could be used in the industrial system." [1]

Poverty and Crime

Among the results from this faulty organization of society are poverty and its attendant conditions. "In every large city are to be found the districts of congested population. Here are the dwelling houses and tenements in which many of the poor are crowded and live in conditions which are uncomfortable and

[1] *Poverty and Social Progress*, New York, 1916, pp. 358–9.

insanitary. The furnishings of these homes usually are insufficient for comfort and for health. The food is inadequate and of poor quality. The results from these conditions are to be found in physical weakness and widespread disease. As a consequence, the adults are inefficient at their work, and the children unable to learn with facility in the schools. These are the districts in which the morbidity and mortality rates are high. Frequently also they are the districts in which the rates for crime and intemperance are high. It goes without saying that forces for crime and intemperance are to be found everywhere in human society. But there is no doubt that the conditions of the poor stimulate both of these evil tendencies. This is peculiarly true of intemperance. It is in the main the misery of the poor which impels them to seek the temporary relief furnished by alcoholic beverages, thus inevitably leading them to a far worse state of misery.[1] Thus it is that intemperance, which is to so great an extent a result of poverty, becomes as well a potent force for poverty.

"Under these conditions it is hardly possible for the family life to develop to its fullest extent. On account of lack of leisure and of the necessary facilities, both the children and the adults fail to get a sufficient amount of recreation. For similar reasons there is obviously little opportunity for cultural development among the poor.

"Nor are these conditions limited to large cities, for they are to be found also in hovels on the outskirts of small towns and villages, and even in the open country. Furthermore, most of these conditions characterize the homeless vagrants and mendicants who wander from place to place, usually in greater destitution than the poor who have homes.

"The results of these conditions to the poor themselves can perhaps be best summed up in the one word misery. But there are several evil results from poverty to the rest of society. Even though there are certain individuals who profit from the misery of the poor, society as a whole suffers from poverty in various ways. As we have already noted, the prevalence of disease, crime and certain kinds of vice is stimulated by poverty, and, as all of these evils are more or less contagious, their prevalence

[1] See, for a discussion of this subject, a monograph by the present writer entitled *Inebriety in Boston*, New York, 1909.

is by no means limited to the poor themselves. The cost of caring for many dependents who might be self-supporting, and of a considerable number of criminals whose crimes are due to poverty, falls upon society as a whole. Looked at from the esthetic point of view, the presence of poverty is a blot and an eyesore upon civilization, and the life of society as a whole will be raised to a higher plane and made more refined if this blot can be removed." [1]

We can now discern how these features of the present economic organization of society influence crime. The unsettled economic conditions due to the trade cycle are reflected in the correlation between fluctuations in prices and wages and changes in the extent of crime. The great inequality in the distribution of wealth, as indicated by the vast difference in the economic welfare of the poor and the rich, is reflected in the great disparity between the criminality of the poor and of the wealthy classes, as indicated by the economic status of the criminals.

These economic conditions bring a good deal of pressure to bear upon many individuals to commit criminal acts. Many of the weaker individuals, and some of the stronger ones as well, are certain to yield to this pressure. In some cases this pressure arises out of a lack even of the means of subsistence, so that the individual faces starvation. In a larger number of cases the pressure arises out of a desire for a higher standard of living, or, at any rate, what the criminal regards as a higher standard. Some writers assert that privation is rarely ever the cause of crime, because the destitute person will not usually steal the food or the clothing which he actually needs.[2] But this fact does not disprove that privation is the cause of many of these crimes, for under many circumstances it would be inconvenient to steal the necessary articles, and much more profitable to steal something else of greater value, and then to secure with the proceeds of the theft the things actually needed.

The immediate causes of the condition of poverty or relative

[1] *Poverty and Social Progress*, pp. 225–7. In this book I have discussed at length the causes of poverty, such as unemployment, low wages, the pressure of population upon the means of subsistence, etc., and the remedial and preventive measures by means of which poverty can be lessened and prevented.

[2] For example, H. Joly makes this mistake in his *La France criminelle*, Paris, 1889, pp. 357–8.

poverty which gives rise to this economic pressure are numerous. Among the principal ones are the large amount of unemployment which is caused mainly by the instability of industry, and the low wages which result largely from the weak position of the worker as compared with the position of his employer. Out of poverty grow pauperism, mendicancy and vagrancy, which are frequently in themselves forms of crime, and still more frequently lead to crime.

But it is not only the economic pressure upon the poor which leads to crime, but also the pressure upon many individuals who are not poor, or, at any rate, are poor only as compared with the wealthy. In these cases the pressure takes the form of a desire for a higher standard of living. This accounts for most of the numerous crimes committed by the class of small merchants and traders. It also accounts for the crimes involving much larger amounts of money committed by big speculators, fraudulent bankrupts, clever swindlers and exploiters of the public. From these criminals we pass by imperceptible degrees to the professional criminals, whose careers are determined to a large extent by economic considerations.

I have already proved that the criminal record of wealthy classes is far below that of the poorer classes. But while great wealth does not encourage criminality, it may lead to a good deal of vice. This is most likely to happen when it is not accompanied by culture and refinement. It frequently leads to excessive indulgence in alcoholic liquors, though not for the same reasons as in the case of the poor. It leads to various other forms of riotous living which are possible only for the rich, and the desire for which is stimulated by the satiety which arises out of great luxury.

CHAPTER VII

THE POLITICAL BASIS OF CRIME

Political organization and crime — Theories of government — Governmental responsibility for crime: inefficient and corrupt government — Influence of war and militarism upon crime.

In one sense it is true that crime is due entirely to political factors. As I have stated in an earlier chapter, there could be no crime in the strict sense of the term without political organization. Not until government came into being could certain acts be stigmatized by the law as criminal. Consequently, the nature of the acts which are criminal at any time and place will be determined in large part by the nature of the political organization.

Under a monarchical system of government the penal law will jealously safeguard the rights and interests of the reigning dynasty, and the stronger and the more despotic the monarch the larger will be the portion of the penal code which is devoted to offenses against him. In similar fashion under an oligarchy the penal code will be devoted largely to safeguarding the rights and interests of the dominant class. To the extent to which the government is democratic it will be devoted to protecting the interests of society as a whole.

Furthermore, the political organization of the world as a whole is of significance in this connection. At present nationalism reigns supreme, and promotes a vast amount of warfare, the effect of which I shall discuss presently. If the world ever passes from the régime of nationalism to internationalism, and something in the nature of a world state is established, this great change will doubtless influence the penal code.

But in addition to prescribing what acts are to be stigmatized as criminal, the government and the political organization in general are among the numerous factors which determine how many crimes are to be committed, and by whom they are to be committed. The government is a direct cause of crime when it is

maladministered in such a fashion as to be an immediate factor for criminal conduct. It is an indirect cause of crime to the extent to which it creates conditions which encourage criminal conduct and fails to provide conditions which would prevent such conduct. I shall discuss first the indirect influence of government.

Political Organization and Crime

It is evident that the way in which the government is organized and the nature of the laws promulgated and enforced by it will have some effect upon economic and other social conditions. But the opinion of any one as to the extent to which these conditions can and should be influenced by the government, and consequently the extent to which the government can be held responsible for criminal conduct, will depend upon his theory of the functions of government. There have been many of these theories which may be briefly classified and described as follows.

At one extreme is the individualistic type of theory according to which the only function of government is to regulate the conduct of the individual to the minimum degree necessary for the maintenance of order, but to undertake no economic or other social functions whatsoever. This type of theory is represented by the *laissez faire* philosophers. At the other extreme is the socialist theory of government according to which the government shall own and operate all economic enterprizes, so that all economic activities shall be political as well as economic in their character. Between these two extremes are many theories, some of which are more or less individualistic in character, and others are more or less socialistic. The representatives of these theories usually assume the welfare of society as the criterion of governmental activity, so that these theories may be called social welfare theories of government. Each of these theorists contends that the government shall extend its economic activities as far as he thinks will be conducive to social welfare. Consequently, according to the different social welfare theories the government should extend its economic activities in varying degrees, and the more socialized theories permit of extensive governmental activity approaching that of the socialist state.

According to the individualistic theory the state is not at all or only to a very slight extent responsible indirectly for criminal conduct. It is directly responsible for such conduct to the extent to which it fails to maintain order. According to the social welfare theories the state is responsible indirectly for criminal conduct to a varying degree. According to the socialist theory it is almost entirely responsible, both directly and indirectly. The theorists of the individualistic school usually assume that criminal conduct is inevitable and permanent, because it arises out of immutable human traits which cannot be influenced by political means. The socialists insist that criminal conduct is largely preventable, and would exist only to a slight extent under the socialist state.

It is impossible to discuss these theories at length here, since they involve very complicated and perplexing problems. Political organization is in large part a reflection of economic and social conditions in the past, but it becomes in turn an important factor in determining these conditions in the present. All of the civilized governments of today are based upon social welfare theories, though they differ considerably amongst themselves as to the extent to which they extend their economic and other social activities. We shall, therefore, assume for the present the general point of view of the social welfare theories and glance briefly at the ways in which the government is indirectly responsible for some of the criminal conduct.

Governmental Responsibility for Crime

Public sanitation and hygiene are necessarily in the hands of the government, and the extent to which and the efficiency with which they are cared for determines in part the health and physical well-being of the populace, which in turn reacts upon criminal conduct. The construction and arrangement of dwelling-houses and other buildings in towns and cities is regulated by the government, and this regulation and planning affects materially the living conditions of the inhabitants. The extent to which and the efficiency with which educational facilities are furnished by the government affects materially the intellectual traits of the people. The manner in which and the extent to which the use of alcoholic liquors, drugs, and other

noxious substances is regulated and restricted by the government has more or less influence upon criminal conduct.

All of the above measures are now performed to a greater or less degree by civilized governments. The state may also be indirectly responsible for some criminal conduct by imposing oppressive restrictions upon its citizens. For example, rigid marriage laws lead to rape and other sexual crimes, while free marriage and divorce encourage satisfactory sexual and domestic conditions.

But beyond these measures are measures which reach much further, and which are intended to bring about much greater changes in society. Some of these measures have been adopted by many of the civilized governments of the world. Several of these measures are intended to change the distribution of wealth so as to make it more equal. Among these measures are various forms of taxation, wage legislation, price legislation, etc. Other measures are directed towards stabilizing commerce and industry, so as to eliminate as far as possible the fluctuations and instability described in the last chapter. Among these measures are the organization of the banking system, the regulation and restriction of speculation, the prevention of private monopolistic control, etc. All of these measures are more questionable in their character, in the first place, as to whether they are competent to attain the objects towards which they are directed, and, in the second place, as to whether they will lessen the amount of criminal conduct. I have not the space to discuss these problems, but will point out the dangers involved in all such legislation so far as it bears upon criminal conduct.

In the first place, it is evident that by creating more laws new opportunities for the violation of laws are brought into existence. In this fashion the total number of criminal acts may be increased. However, this is not necessarily an evil in the long run in the case of a specific law, for the law may do more good in other ways than it does evil by increasing the number of crimes. In many cases this is a difficult question to decide. In similar fashion the abolition of restrictive legislation may lessen the number of violations of laws. But the restrictions may be of more value to society than the decrease in the number of the violations of the law.

In the second place, much legislation and regulation on the

part of the government may lead to an excessive amount of restriction and social control. This is an evil in itself, for all forms of social control are evil in the sense that they restrict the individual, and should therefore be tolerated only to the extent that they are absolutely necessary for the welfare of society. But it may prove to be an evil also by discouraging individual initiative unduly, and thus decreasing the total amount of human achievement. This may indeed prove to be the greatest evil arising out of too much legislation. At various points in this book I shall have occasion to mention these dangers with respect to certain forms of legislation and governmental regulation.[1]

There are many ways in which the government is a direct cause of crime. It may give rise to crime because it is a bad form of government, or because, even though a good form of government, it is badly administered. The excellence of the form of the government will depend largely upon the place and time in which it exists. A form of government which is excellent for a barbarous people may be very undesirable for a highly civilized people. Consequently, it is impossible to generalize

[1] Two eminent Italian criminologists, Ferri and Garofalo, represent the opposing points of view with respect to the limitations upon legislation and governmental regulation. Ferri advocates a large number of measures which he calls "substitutes for punishment" (*sostitutivi penali*), or "equivalents of punishment" (*equivalents des peines*). It would be more correct to call them "preventives of crime." Among these are free trade, freedom to emigrate, taxes upon the rich, public works, drastic regulation of the manufacture and sale of alcohol, freedom of marriage and divorce, etc. (E. Ferri, *Criminal Sociology*, Boston, 1917, Part II, Chap. 5.)

Garofalo opposes most of these measures on the ground that the state is not omnipotent to attain the ends sought. He expresses his opinion with respect to the limitations upon legislation as follows: "In the prevention of crime, legislative measures of general application cannot go beyond the maintenance of a good police system, the wise administration of justice, and the indirect development of a public moral education which will tend to counteract certain vicious habitudes ordinarily the cause of crime. Upon these habitudes it cannot act directly except in some special cases, as in the regulation of liquor-selling, gambling, and the carrying of arms. Aside from such instances, the state should be careful how it interferes with the individual rights of the citizen. For notwithstanding the laudable object which moves it to act, its interference is bound to develop abuses, to degenerate into unendurable violation of personal liberty, and to be productive of new disobediences on the part of the citizen." (R. Garofalo, *Criminology*, Boston, 1914, pp. 189–190.)

with respect to the form of government. In similar fashion, the excellence of the administration will depend in part upon the place and time.

Political corruption in the administration of the government is in itself a form of crime. Even when it is not criminal in the technical legal sense, it is at least vicious. But it is far more injurious as a cause of crime because of the gross inefficiency it introduces into the administration of the government. It usually arises partly out of the form of the government, which fails to furnish a sufficient number of checks and safeguards against dishonesty, and partly out of the state of public opinion and public morals, which breeds the corrupters and does not sufficiently reprehend their dishonesty. When this corruption becomes extensive, it usually weakens the police by destroying its morale, it may invade the courts of public justice, and is very likely to promote inefficiency in the administration of the penal institutions. In these ways it vitiates largely the efficiency of the law in suppressing crime.

In addition to the evil influence of political corruption the administration of the law may be greatly weakened and vitiated by other causes. The police force frequently is weak and inefficient because it is not properly trained and organized. The so-called "police system" of corruption may grow up within the police department itself because impossible tasks, such as unenforceable laws against vice, have been laid upon the police by the legislature and the public. Nothing can be more disastrous to the effective suppression of crime than the weakening and corrupting of the police agency, which is the physical arm of the law for its own enforcement.

The law has usually been unscientific inasmuch as it has not been based upon the available scientific knowledge as to the causes of crime and the traits of the criminal. This knowledge can be used so as to render much more effective both the suppression and the prevention of crime. The government has failed to gather and make use of statistics which would be of great value in measuring the effects of the different kinds of penal treatment, as well as by throwing much light upon the causes and conditions of crime.

The courts have frequently been weak and inefficient. This has been due in part to political influence, whether corrupt or

otherwise. But it has probably been due more to the fact that the judges have usually not been trained and selected in a proper manner. It has also been due in large part to abuses of the jury system, and perhaps to a large extent to fundamental defects in the jury system itself.

Methods of penal treatment have usually been inefficient, and frequently have been so bad as to cause more crime than they have suppressed and prevented. Punishment has usually been based upon vengeance, which cannot furnish a rational criterion of the efficacy of penal methods. In recent times it has been based to a considerable extent upon the principle of deterrence. But inasmuch as accurate, scientific methods of measuring the extent to which punishment actually deters have not been applied, it has been impossible to ascertain whether or not any deterrence has been attained. Capital punishment, torture, imprisonment of various sorts, transportation, etc., have proved more or less ineffective in various degrees, and have stimulated a good deal of crime in several ways. Certain methods, such as the method of reparation, which may prove to be effective, have been tried very little or not at all. In fact, the whole subject of penal treatment needs a thoroughgoing scientific study on the basis of an extensive knowledge of the causes of crime and of the traits of the criminal. No government has as yet done much towards making such a study.

But not only is the administration of penal law of importance for the prevention of crime. If the civil law is not efficiently administered, its maladministration is likely to lead to at least a few crimes, while an efficient administration of the civil law is a more or less powerful preventive of crime. If the civil law is maladministered, dissensions and conflicts are sure to arise between some of the litigants or would-be litigants, and in some cases lead to crimes against the person or against property or both. An efficient administration of justice in the civil courts, on the contrary, obviates most of these differences, and promotes a spirit of harmony and good will in the public at large which is likely to prevent some crimes. For the attainment, therefore, both of penal and of civil justice it is important, in the first place, that the civil law be based upon rational, scientific principles, and, in the second place, that the civil courts administer the civil law efficiently.

Influence of War and Militarism upon Crime

Before finishing this discussion of the political factors for crime I wish to touch briefly upon war and militarism in relation to crime. In the present day war arises largely out of the prevailing national political organization of the world. If the present régime of nationalism is ever superseded by an international political organization, such as a world state, much of this warfare will perforce disappear. However, that time is probably still far distant, so that it is important to consider the influence of war and militarism upon crime.

The effects of war are so complicated that it is difficult to analyze and measure them accurately. There is reason to believe that war has both favorable and unfavorable immediate effects upon crime. But there is much difference of opinion as to whether its ultimate effect is favorable or unfavorable.

Statistical records indicate that criminality frequently diminishes apparently during time of war. This doubtless is due in large part to the fact that many of those who would otherwise be engaged in criminal activity volunteer for military service or are drafted into the army. Consequently, their criminal tendencies towards murder, theft, etc., are furnished an outlet in the opportunities to kill, to plunder, etc., in the course of warfare. War therefore becomes, in a measure, a substitute for crime for these persons. But this apparent diminution of criminality during time of war is probably due in part to the fact that the repression of crime is usually weakened during time of war, so that many crimes are not pursued and punished. This may explain why the criminality of women and of children as well as of men sometimes appears to diminish during time of war.

Some writers, however, contend that war diminishes crime by acting as a moral influence. Their opinion is that war stimulates a condition of emotional excitement under which many desires and impulses which would otherwise assume a criminal form are turned into patriotic, national, and social channels, and results in efforts in behalf of the public welfare.[1] War also

[1] Tarde expresses a similar idea in the following words: "The truth of the matter is that crime has become an evil without anything to compensate for it since it has advantageously been replaced by militarism and warfare. An army is a gigantic means of carrying out, by massacre and

stimulates greatly the virtue of courage and leads to many deeds of valor. There is probably a measure of truth in this idea, especially when the war is for the purpose of carrying out a great popular ideal. But it must be remembered that warfare inevitably engenders a vast amount of hatred and vengeance towards enemies, which probably more than counterbalances this so-called moral influence of war.

Militarism has an influence upon crime during times of peace as well as during wartime. Military service is reputed to have both a moral and an immoral influence upon conscripts and volunteers. It is believed by some persons that military training furnishes an excellent discipline for the character. It doubtless encourages to a certain extent the virtues of obedience, orderliness, regularity, etc. But, on the other hand, military organization is necessarily of such a nature as to develop servility in the common soldiers and a domineering spirit in the officers. It also tends to develop contempt for and brutality towards the common civilian class.

Furthermore, the conditions under which military service is usually performed are bad, especially for the young conscripts. These youths are torn away from their homes at a period of life when they are likely to form bad habits. They are thrown into the garrison life in large cities and elsewhere in which they may easily acquire vices and diseases which will affect their conduct for evil throughout the remainder of their lives.

It goes without saying that the extent to which these evils will prevail in military service will depend in part upon the way in which an army is organized and the attention which is paid to conditions of living for the soldiers by those in charge of the

pillage on a vast scale, the collective designs of hatred, vengeance, or envy, which one nation stirs up against another. Condemned under their individual form, these odious passions, cruelty and greed, seem to be praiseworthy under their collective form. Why? First of all, because they quell many little internal conflicts though they bring about an external one; also, because they lead to a warlike solution of this very difficulty, and to the increase in territory as a result of the peace which is bound to follow. The effect of militarism is to exhaust the criminal passions scattered through every nation, to purify them in concentrating them, and to justify them by making them serve to destroy one another, under the superior form which they thus assume. After all is said and done, war enlarges the sphere of peace, as crime formerly used to enlarge the sphere of honesty. This is the irony of history." (G. Tarde, *Penal Philosophy*, Boston, 1912, p. 422.)

army. If an army is as democratically organized as is possible for a military body, and if the government provides the best possible living conditions for the soldiers, these evils will be reduced to a minimum. But even if this end is attained, it is doubtful if the benefits derived from military service can counterbalance its evils.

It has been asserted by some that the criminality of the soldier class is higher than that of the civilian population. But this appears doubtful when the criminality of the soldiers is compared with that of the male civilian population of about the same ages.[1] Wherever it is true, the difference usually is not great, and is probably due in part at least to the fact that the soldier is guilty of various military offenses, such as insubordination and malingering, which the civilian cannot commit. It may indeed be true that in some places the criminality of the soldier class is below that of the civilian population, owing to the strict discipline maintained over the soldiers. This fact, however, does not disprove the evil effects of military service, for these effects may display themselves later in the lives of the soldiers, after their military service is ended.

Turning to the indirect but much more far-reaching effects of war and militarism upon crime, we must note first the spirit of lawlessness and violence which is encouraged by a war, and which usually persists for some time after the war ends and may manifest itself in an increase of crime. The history of every nation furnishes more or less evidence of this condition. War arouses the passions of hatred, vengeance, and envy, and requires the committing of many deeds of violence. Consequently, it is not surprising that it should lead to this spirit of lawlessness and violence.[2]

[1] *Cf.* C. Lombroso, *Crime, Its Causes and Remedies*, Boston, 1911, pp. 201–202.

[2] The atrocities committed in the course of the great war which is raging in Europe and elsewhere at the time of the present writing furnish numerous illustrations of the spirit of lawlessness, violence, and cruelty aroused by international warfare. It is only necessary to mention the ravishment of Belgium, Northern France, Poland, and Serbia, and the massacre of Armenians in Turkey to realize the truth of this statement.

The Carnegie Endowment for International Peace appointed an international commission to inquire into the causes and conduct of the Balkan wars of 1912 and 1913. In its report the Commission stated as follows the moral

But the results from war which probably have the greatest indirect influence upon crime are the economic effects of war. These effects may be briefly stated as follows.[1]

War is almost certain to reduce the aggregate production of wealth, thus making society poorer at the end than it was at the beginning of a war. This loss is due to the destruction of property by military operations and to the cessation in the production of wealth during wartime. It goes without saying that most of the goods produced for war purposes are worthless at the end of a war. This means that, unless something is done to distribute wealth more evenly, the working class will be poorer at the end of a war.

Furthermore, the means of production available at the end of a war are likely to be smaller. Owing to the reduction in the supply of wealth, there is likely to be a shortage of capital. Owing to the destruction of human life, there may be a shortage of labor. The loss of life caused by war is largely of male adult laborers, many of whom are skilled, whose rearing and training are therefore lost to society and diminish the productive labor force.

In order to reconstruct what has been destroyed by the war, and to raise the supply of wealth to the normal, production is almost certain to be brisk after a war, within the limits placed by the available capital. Inasmuch as the supply of labor has

effect upon the nations involved of the atrocities committed in the course of these wars: "Reference has already been made to the reflex psychological effect of these crimes against justice and humanity. The matter becomes serious when we think of it as something which the nations have absorbed into their very life, — a sort of virus which, through the ordinary channels of circulation, has infected the entire body politic. Here we can focus the whole matter, — the fearful economic waste, the untimely death of no small part of the population, a volume of terror and pain which can be only partially, at least, conceived and estimated, and the collective national consciousness of greater crimes than history has recorded. This is a fearful legacy to be left to future generations." (*Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars*, Washington, 1914, p. 269.)

[1] The next few paragraphs are taken in part from my *Poverty and Social Progress*, New York, 1916, pp. 199–201. In that book I have described at greater length the economic effects of war. For other discussions of the influence of war and militarism upon crime, see, N. Colajanni, *La sociologia criminale*, Catania, 1889, Vol. II, pp. 572–588; W. Bonger, *Criminality and Economic Conditions*, Boston, 1916, pp. 516–519.

diminished, the surviving laborers are likely to get better wages and to suffer less from unemployment. In other words, there comes a period of prosperity which benefits both the employer and the worker. It is indeed a sad commentary upon the economic organization of society that the period immediately following a war is frequently much preferable to many a period of depression during times of peace. This fact has led many to think that war is a good thing, because of the stimulus it apparently gives to manufacturing and trade. But it must be remembered that industrial activity after a war is largely due to an effort to get back to the condition which existed before the war, by making good the losses mentioned above.

It must also be remembered that the payment of the cost of a war hangs over a people long after the war is ended. No modern government can carry on a war very long without raising special funds. These funds are secured usually by issuing long term bonds, which are purchased in the main by capitalists, and upon which interest must be paid for many years. The question as to who pays in the end for these bonds depends upon the incidence of the taxes by means of which they are paid. Up to the present time it is doubtless true that they have been paid for in the main by the poorer people, upon whom indirect taxes usually fall in the end. So that wars have been paid for mainly by the working classes, and one of the results of modern warfare has been to furnish another means of transferring wealth from the poor to the rich; for these bonds have usually furnished safe investments at fairly good rates of profit for the capitalists, while for many years after a war the poor are contributing heavily to pay the interest to the capitalists, and ultimately to pay back the principal. If wars were paid for by heavy assessments upon the rich at the time of the war, or by the issue of bonds to be paid for by direct taxes upon the rich, such as inheritance and income taxes, a war would no longer be a force for making the poor poorer by making the rich richer; for while the poor would not gain anything through the war, they would not lose as much as they do now, and the rich would not become richer at their expense. It is probable that if such were the case, there would be much less war; because the rich usually have much influence with governments, and

under those conditions it would no longer be to the interest of the rich to have war.[1]

It is hardly necessary to call attention to the heavy expenditure between wars caused by military warfare. So long as international relations are based on the theory that the economic interests of nations conflict, war will continue to be an imminent possibility for every nation. Consequently, every nation must maintain itself in a state of preparedness for war. This means constant expenditure for munitions and other equipments of war, and for the services of fighting men who are being withdrawn from the production of wealth. And as no government can safely, from the military point of view, refuse to give pensions, for a long period after every war of any extent there must be heavy expenditure for the payment of pensions. In most cases these expenditures are paid for by means of taxes whose incidence falls upon the poorer classes.

War and militarism are, therefore, factors for creating economic conditions which, as I have shown in the last chapter, encourage crime. They accentuate the inequality in the distribution of wealth, and thus swell the size of the poorer classes which contribute most heavily proportionately to the criminal class. Furthermore, war increases the instability of commerce and industry by disturbing the normal processes of manufacture and trade. This is well illustrated by the fact that even the smaller wars cause world-wide disturbances in the stock markets and in the prices of many commodities, while a great war is almost certain to bring on a world-wide panic, crisis, and period of depression. This instability in economic conditions, by rendering the economic status of many persons insecure through loss of employment, loss of property, etc., increases the incitement and the temptation to acquire criminal habits. Furthermore, the great fluctuations in prices in the stock markets and elsewhere furnish shrewd speculators excellent opportunities to amass great fortunes, and thus to enhance the inequality in the distribution of wealth.[2]

[1] As a result of the great war now in progress (1917) the rich are being heavily taxed in some of the belligerent countries. This may prove to have a deterring influence upon war in the future, provided the rich do not succeed in transferring the incidence of these taxes upon the poor.

[2] See my *Poverty and Social Progress*, pp. 404–405.

In the last analysis, war and militarism impede the progress of civilization, and thus delay the coming of a state of society in which crime will in all probability be greatly diminished. Social progress requires the constant extension of coöperation in the form of the division of labor, in order thereby to augment the sum total of human achievement. The principle of the division of labor has already been applied to a far-reaching degree in many fields of human activity, such as economic affairs, science, art, etc. But unfortunately it has so far been applied only to a slight extent in political affairs. Nationalism is now the fundamental principle in political organization, and stands as a barrier against the division of labor and coöperation, not only in political matters but also frequently in economic activities. Generally speaking it is a serious hindrance to the diffusion of culture, and therefore an obstacle to the unification and organization of mankind into a single coherent social organism. Not until internationalism supersedes nationalism, and something in the nature of a world state comes into being, can civilization attain the highest possible rate of progress.

CHAPTER VIII

THE INFLUENCE OF CIVILIZATION UPON CRIME

Religion and crime — Science and crime — Art and crime — The press and crime — The advance of civilization and the increase of crime.

In the two preceding chapters I have discussed two of the most important, perhaps the most important, aspects of civilization in their relations to crime, namely, the economic and the political aspects. There are other aspects of civilization and other forces at work in our civilization which must be discussed in similar fashion. Furthermore, it is essential to discuss the influence of the progress of civilization upon crime, in order to ascertain what effect it has upon crime, both with respect to kind and quantity.

Religion and Crime

In Chapter II has been described briefly the influence of magic and religion upon the origin and early evolution of crime. Magical ideas and religious beliefs determined in large part what acts were to be included in the early categories of crimes. With the evolution of civilization magical ideas have lost their power almost entirely, because of the obvious failure of magical attempts to coerce and control natural processes, and because effective scientific methods have superseded the ineffective magical methods. Religion also has lost much of its power, and has been superseded by science to a large extent, because of the apparent failure of religious attempts to propitiate the alleged spiritual beings which are reputed to control the processes of nature. However, religion has one great advantage for survival over magic.

When religious attempts fail, it is always possible to fall back upon the hypothesis that the gods have been unwilling to grant the requests of men. Inasmuch as mankind can never hope to attain absolute knowledge by means of the most effective human method of acquiring knowledge, namely, the method of science, it will never be possible to disprove categorically the

existence of these hypothetical spiritual beings, however far-fetched and improbable these hypotheses may be, nor the traits attributed to them by religious devotees. Consequently, religion still retains a considerable influence which must be discussed in relation to crime.

Representatives of religion frequently assert or imply that irreligion is a potent force for crime. It is difficult to measure accurately the influence of religion upon crime. But so far as reliable statistics are available they disprove this assertion on the part of the religionists. For example, Bonger states that according to the census of 1879 and 1909 in the Netherlands, the percentage of those who were not church members increased from 0.31 to 4.97, an increase of over 1,500 per cent in thirty years; whereas during the same period crime decreased in extent.[1] This indicates that apparently the diminution of religion as measured by the decrease in the church membership was, to say the least, not causing an increase of crime, if indeed it was not lessening the amount of crime. Bonger has also prepared the following table, based upon the criminal statistics of more than 126,000 individuals sentenced during the period from 1901 to 1909 in the Netherlands:— [2]

RELIGION AND CRIME IN THE NETHERLANDS, 1901–1909
Number Sentenced to 100,000 of the Population over 10 Years Old

	Protestant	*Catholic*	*Jew*	*Not Members of Any Religion*	*Total Population*
All offenses	308.6	*416.5*	212.7	84.2	337.3
Theft	40.0	*54.8*	25.5	9.6	43.9
Aggravated theft	19.9	*24.0*	12.7	5.2	20.7
Receiving stolen goods	2.6	3.5	*9.2*	0.7	3.0
Embezzlement	8.6	9.3	*13.1*	1.9	8.7
Fraud	2.4	2.5	*3.9*	0.4	2.4
Offenses against public decency	1.9	*3.4*	2.0	0.5	2.4
Minor sexual offenses	*1.2*	1.0	0.3	0.2	1.0
Rape	1.5	*2.2*	1.5	0.7	1.8
Sexual crimes with persons under 16	*0.3*	*0.3*	0.1	0.0	0.3
All sexual crimes	5.1	*7.1*	4.1	1.6	5.7
Rebellion	25.9	*37.0*	13.2	12.2	29.0
Assaults	74.4	*98.2*	43.2	20.1	80.1
Serious assaults	8.5	*11.0*	3.9	1.9	9.1
Homicide and murder	0.4	*0.6*	0.5	0.1	0.5

[1] W. Bonger, *Criminality and Economic Conditions*, Boston, 1916, p. 208.
[2] W. Bonger, *op. cit.*, p. 209.

As Bonger says, the conditions revealed by this table are that "the first place is almost always occupied by the Catholics, the second by the Protestants, and then come the Jews (except in cases of receiving stolen goods, embezzlement, and fraud), and the minimum of criminality (in all crimes without exception) is shown by the irreligious!" [1]

It is, of course, true that church membership is not a perfect criterion of religiosity. But it will serve as a rough measure, because there are irreligious persons in the churches just as there are religious persons who do not belong to any church. In fact, if there is any difference whatever in this respect, the chances are that there are more irreligious persons who belong to churches for family, business, and political reasons, or simply through inertia because they were born into them, than there are religious persons who do not care to join a church.

The relative criminality of the adherents of the different religions is also of some importance. In Germany, during the years 1892–1901, the average number of persons convicted per 100,000 civilians of each faith was: — [2]

1,361 Catholic Christians;

1,122 Evangelical Christians;

1,030 Jews.

The German statistics confirm the Dutch statistics given above. The low criminality of the Jews is probably due to the fairly high average prosperity of the Jews in both of these countries, and to the strong family, racial, and religious organization amongst them. As a member of a small and more or less alien racial and religious community, there is probably more or less social pressure upon the individual Jew to refrain from breaking the law in order to avoid bringing hostile criticism upon his community from without the group.

The high criminality of the Catholics is sometimes attributed in part to their practise of auricular confession. It doubtless happens that some ignorant persons are emboldened to commit crimes because they depend upon auricular confession and the performance of the penance imposed upon them to absolve them from the consequences of their crimes. But in other cases this form of confession has probably led to the reparation of crimes,

[1] *Op. cit.*, p. 209.

[2] G. Aschaffenburg, *Crime and Its Repression*, Boston, 1913, p. 52.

or to a restraint upon would-be criminals from committing crimes. So that it is impossible to determine whether it has encouraged more crime than it has discouraged. There can be no doubt, however, that the religious doctrine of the forgiveness of sins after repentance has frequently encouraged persons of weak character to commit immoral and criminal acts. Whether or not this has been more true of the Catholic religion than of other religions which hold the same tenet, it is difficult to say. It may have as much influence among some of the Protestant sects. The Christian doctrine of the forgiveness of sins possesses this evil influence because it disseminates the grossly erroneous notion that repentance absolves a person from responsibility for the immorality of his past conduct. It would be difficult to find a more anti-social and immoral religious doctrine.

A fact which is probably of much greater significance with regard to the high criminality of the Catholics is that in Germany and in many other countries where both Catholics and Protestants are numerous the Catholics are not so affluent as the Protestants. Inasmuch as the poorer classes produce more criminals than the wealthier classes, this fact may account entirely for the high criminality of the Catholics. However, this is not necessarily the case, and the religious factor may have considerable influence. It may be that Catholicism does not encourage the material well-being of its followers as much as Protestantism and certain other religions. Or it may be that the Catholic religion appeals more strongly to the poor and the ignorant, and then reacts upon them so as to increase their poverty and ignorance. Certainly the subservient attitude required by the Catholic Church of its devotees does not seem calculated to encourage them to acquire knowledge.

The religious traits of many criminals have been described.[1] Among them is to be found nearly every type of religionist. So far as it is possible to generalize about them, it is probably safe to say that their religion is more emotional and more superstitious than the average. It is evident that it has failed entirely or in large part from restraining their criminal propensities, and may in some cases even stimulate those propensities. So large a

[1] See, for example, the writings of C. Lombroso, *Crime, Its Causes and Remedies*, pp. 138–144, *L'homme criminel, etc.;* E. Laurent, *Le Criminel*, pp. 64–70; C. Perrier, *Les Criminels;* and many other criminologists.

proportion of the criminals are religious that it is the most egregious folly to regard religion as a panacea for crime, as seems to be the belief of many representatives of religion.

The above-mentioned facts suggest conclusions which are highly probable on other grounds as well. It is not surprizing that there is a lower percentage of criminality among those who are accounted as irreligious, for this group includes a larger percentage than the religious group of persons who think for themselves and who, whether religious or irreligious, do not accept the authority and tutelage of any religious organization. This fact implies a high standard of intelligence and education, which is not usually correlated with criminality. This is not because intelligence and education are in themselves necessarily preventives of crime, but because they are likely to place an individual in a position in society where the temptations towards criminal conduct are comparatively small.

For similar reasons it is not surprizing that the religions whose followers are ignorant and poor display a high percentage of criminality. Furthermore, it is not to be expected that religion in itself is to display a universal and uniform tendency towards discouraging crime, because religions differ greatly amongst themselves, and therefore in their influence upon social phenomena. In order to understand the last statement it will be necessary to study briefly the broader aspects of religion, and to bring to light its indirect and remote effects upon crime.

The religious teachings received by most persons during childhood and early youth usually make a powerful impression upon the emotional nature. This impression is probably due in the main to the mysterious and mystical features of religion, which have this effect through physiological and pyschological processes which there is not the space to describe here. Especially impressionable is the youth at the time of puberty, for at that time there reach maturity the sexual organs and processes which furnish the most powerful affective stimulants in the human organism. If the individual passes through the psychological crisis which in religious experience is called conversion, with its accompanying phenomena of repentance and remorse, the impression made by the religious teachings becomes all the more indelible upon the mind of the neophyte.

The significance of the above facts for our purpose is clear.

Every religion contains more or less extensive accretions in the way of moral commands and guidance for its adherents. These moral teachings receive a powerful dynamic reënforcement from the emotional factors in religion. Furthermore, these teachings probably receive some reënforcement also from the minatory features of religion, namely, from the intimidation attempted by nearly every religion by means of threats of supernatural punishments.[1] Consequently, it becomes a question of considerable moment as to what are the moral teachings of a religion. It goes without saying that the religions differ greatly amongst themselves in this matter, so that it is difficult if not impossible to generalize with respect to them. Some of these teachings are genuinely moral in the sense that they promote harmony in social relations and the welfare of mankind. Some of these teachings are highly immoral in the sense that they instigate strife and conflict, and cause untold human suffering and unhappiness by enjoining upon the religious devotees militant propagandism, asceticism, penitential pain, minatory terror of supernatural penalties, etc.[2]

[1] The minatory influence of religion has been questioned. It is doubtless not so great as is popularly believed, owing to human heedlessness as to the ultimate consequences of their acts. The same trait accounts for the limited intimidatory influence of legal penalties. But it is, I believe, a mistake to deny it practically all efficacy, as is done by some writers, as, for example, J. L. de Lanessan, who says: "En ce qui concerne la crainte de l'enfer, il est facile de s'assurer qu'elle n'a jamais joué un rôle moralisateur bien considérable." (*La lutte contre le crime*, Paris, 1910, p. 97.)

[2] Lombroso suggests the interesting theory that new religions have a greater moral influence than old religions, because they have not yet fallen into ritualism, symbolism, and other kinds of formalism. (See his *Crime, Its Causes and Remedies*.) "One thing seems clear to me, namely, that the younger religions are, the greater is their moral power, because the letter has not yet encroached upon the spirit, because the enthusiasm for new ideas occupies the mind and draws it away from crime, and, finally, because, whatever be its origin, the organism is then more free from symbols and formulas that clog its activity." (P. 141.) "On the whole, the contradiction of the influence of religion, now great and now totally lacking, disappears when one grasps the significance of the facts. Religion is useful when it is based absolutely upon morals and abandons all rites and formularies. This is a condition that can be realized only in the new religions; because while all in the beginning are moral, afterwards, little by little, they become crystallized, and ritual practices submerge the moral principle, which is less easily conceived and retained by the crowd. All members of new sects are men of one idea, which protects them, like a vaccine, against

We have not the space to appraize the important religions of the world with respect to their moral influence.[1] But there are a number of general considerations which should be noted. There is much talk now-a-days of "socializing" religion. By this it is meant that a large number of moral teachings which are or are supposed to be of social value are to be incorporated in religion. Thus will arise, it is alleged, what is called "social" religion.[2] Some, indeed, insist that religion should become entirely social, thus eliminating the supernatural element.

Now it is evident, on the one hand, that these social teachings are not religious in their origin, but arise out of humanitarianism.[3] It is obvious, on the other hand, that there can be no religion in the strict sense of the term without a supernatural element. Consequently, there can be no purely "social" religion, and the phrase "social religion" is a misnomer for one

ignoble passions." (P. 142.) His conclusion with regard to the influence of religion upon crime is as follows: "The only religions, then, which can prevent crime are those that are fanatical, passionately moral, or just arising. The others are no more effective than atheism, and perhaps less so." (P. 144.)

There is doubtless a measure of truth in this theory. But Lombroso is, I believe, mistaken in assuming that all new religions are necessarily moral in their influence. As I have indicated above, it depends upon whether or not their teachings are moral from the outset in the sense that they are social in their influence. Many religions have been highly immoral from their inception, because of the anti-social character of their teachings. Furthermore, it is impossible for religion to become solely a system of morals, as Lombroso suggests, for then would be eliminated the supernatural element which is essential to every religion. Religion would then become charity, philanthropy, altruism, humanitarianism, etc., but would no longer be religion. Lombroso himself seems to recognize this when he says with regard to charitable activities: "Here, then, it is not religion in general, that deserves the credit, but certain religions only, or, better still, the ideal tendency of certain progressive races. However, we must say of the operation of religion, as we have said of that of charity, that it is always individual, limited, and less effective than the economic influence, which alone is universally felt by the masses." (P. 300.)

[1] A survey of this sort has been made by J. L. de Lanessan, *La morale des religions*, Paris, 1905.

[2] See, for example, E. A. Ross, *Social Control*, New York, 1901, Chap. XVI entitled "Social Religion."

[3] I have described the nature of humanitarianism elsewhere. See my *Poverty and Social Progress*, New York, 1916, Chap. XVII entitled "The Modern Humanitarian Movement." Also see my article entitled *The Rise of Modern Humanitarianism*, in the *Am. Journal of Sociology*, November, 1915.

phase of humanitarianism. This does not mean that it is not possible for a religion to carry along with it at least a modicum of social teachings, and the dynamic element in religion which arises out of its emotional nature may reënforce those teachings, and thus give them greater power. But the question still remains as to the influence of the supernatural content of religion.

It will always be impossible for mankind to know everything, or, indeed, to know anything absolutely. Beyond the bounds of human knowledge will always remain the boundless reach of the unknown and the unknowable, furnishing the opportunity for speculative metaphysics and religion. So long as the metaphysician and the religionist do not invade with their speculations the field of what has become known through the only source of knowledge, namely, science, they are not likely to do any harm. The metaphysician is usually well enough acquainted with science not to commit this mistake. But the representatives and exponents of religion are constantly falling into this egregious error. By so doing they place grave obstacles in the form of superstitious ideas and beliefs in the way of the spread and influence of scientific knowledge. The adherents of the religious cults are induced to accept the hypothetical religious explanations for the proven scientific explanations of natural phenomena, and thus they and through them society at large are led astray in the conduct of life. Consequently, religion and science are irreconcilable not only theoretically, because they are diametrically opposed in method (the speculative theological as opposed to the inductive scientific method), and deal with entirely different subject-matter (the known and knowable and the unknown and unknowable), but also practically, because religion is, or, at any rate, its representatives are continually meddling with the results of science by misconstruing and misrepresenting them and by opposing their acceptance.

This is the most important and most far-reaching consideration with respect to the influence of religion. In the long run it is doubtless of much greater importance than the immediate effect of religion upon crime, or the moral influence of religion upon the population at large. This is true because religion will probably always continue to oppose science, and thus to impede the progress of civilization, for civilization can be constructed

only upon the basis of knowledge such as can be acquired through science alone. It may, indeed, be said that civilization is in a large measure correlated with irreligion in the sense that civilization can grow and progress only as religion decreases and loses its influence.[1]

Innumerable illustrations can be given of the ways in which religion opposes the spread of scientific knowledge, obfuscates the truth, and thus impedes the progress of civilization. The prayers for rain are still read in the Catholic churches and special prayer meetings are still held in many Protestant churches in this country at times of drought, despite the fact that meteorological science has explained for us the forces which control the precipitation of rain. The dogma of the forgiveness of sins still gives currency to the notion that the effects of an act can be wiped out by repentance and remorse alone, or by the absolution which follows penitential acts, despite the fact that the biological and psychological sciences have taught us that the effects of any act, whether sinful or otherwise, upon the organism and personality are indelible.[2] The great war in progress in Europe and

[1] Leuba has made an investigation which is of great significance in this connection. By means of a questionnaire he ascertained the beliefs with respect to religion of one thousand American scientists. He found that only 41.6 per cent of these scientists believed in a personal god. After dividing the thousand into two groups of six hundred less eminent scientists and four hundred more eminent scientists, he found that 48.2 per cent of the less eminent believed in a personal god, while only 31.7 per cent of the more eminent believed in a personal god.

In similar fashion he ascertained the beliefs of these thousand men of science with respect to their belief in personal immortality. He found that 50.5 per cent of the total number believed in personal immortality. Of the six hundred less eminent 59.6 per cent believed in personal immortality, while of the four hundred more eminent only 37 per cent held this belief.

Leuba also made a similar investigation of the religious beliefs of several college classes which seemed to indicate that the religious beliefs of these students decreased with the degree of advancement of their studies. (J. H. Leuba, *The Belief in God and Immortality*, Boston, 1916.)

This investigation furnishes evidence that religion declines with increase of knowledge and ability, both of which are essential factors for the progress of civilization.

[2] The Christian dogma of the forgiveness of sins is stated at many points in the New Testament. For example, in his epistle to the Ephesians, Paul states the doctrine of the forgiveness of sins through the vicarious sacrifice of Jesus for the persons who accept him as their savior. "In whom we have

elsewhere at the time of the present writing has furnished abundant evidence of the belief which is more or less prevalent in each country that the divine sanction somehow or other rests upon that country in preference to other countries, thus intensifying the bitter feeling towards hostile countries, in spite of the fact that according to the monotheistic doctrine itself a unitary deity could not very well take sides with every belligerent.

Science and Crime

The preceding discussion of religion has incidentally revealed the supreme importance of the influence of science. We should, in the first place, speak of the immediate effects of science upon crime. The development of technical scientific methods encourages crime somewhat by furnishing many professional criminals more effective methods of committing certain kinds of crimes. But science has also furnished the police and the courts more effective methods for the detection and the apprehension of criminals. So that in all probability scientific methods have been more effective for the suppression and prevention of crime than they have been effective for rendering crime more facile.

But, as is amply demonstrated in the course of this book, scientific methods are of the utmost value also for ascertaining the causes of crime and the nature of the criminal. With the use of these methods much has already been learned, and much more will doubtless be learned in the future. Only on the basis of this knowledge can an effective program for the treatment of the criminal and the prevention of crime be devized. So that science is of decisive importance in determining how society shall deal with crime in the future.

It is, however, sometimes alleged that modern science has a "materialistic" influence which gives rise to a good deal of immorality. This criticism of modern science doubtless originates in the main from the religious opposition to science, but

redemption through his blood, the forgiveness of sins, according to the riches of his grace." (*Ephesians*, I, 7.)

While this unscientific and anti-social religious doctrine should be repudiated, offenders who display regret and remorse for the injury they have done to others should be treated with magnanimity and mercy in order to encourage them to do better in the future.

a little of it may have a sentimental origin apart from religion. It is claimed that many of those who become imbued with the ideas of modern science discard all of their previous ethical ideas, and are no longer governed by a sense of responsibility in their relations with their fellows. It is doubtless true that this has happened to a few persons, but probably not to many. In most of these cases the individual has been a young person who has had a conventional religious training. In many of these cases the individual has been of an unstable character. It is not surprizing that when the clash between the scientific ideas and the traditional religious beliefs has come in the minds of these persons, it has resulted in a complete overthrowal of the old code of conduct without a substitution for it of a new code. But it is obvious that this is not a necessary result of scientific ideas. On the contrary, a thoroughgoing scientific training makes possible an understanding of the physical conditions under which mankind lives, of human nature, and of the social relations in which men live. This knowledge furnishes the best possible basis for a code of conduct which leads to the most satisfactory life both for the individual and for his fellows. Consequently, it is utterly false to assert that science necessarily leads to immoral conduct, and that religion is absolutely necessary as a basis for a successful code of conduct.

We now come to the most indirect influence of science upon crime, but which is, nevertheless, of the most far-reaching importance. It is obvious that science is essential to the progress of civilization. This progress consists in the main in the acquiring control as far as possible by man of the conditions of his existence, thus enabling him to live the happiest and most normal life possible.[1] The highest degree of human control which is possible can come only through an understanding of the natural forces which determine these conditions of human existence, and this knowledge can be obtained only by science.

Art and Crime

Criminal persons and actions play a considerable part in works of art, and art has a slight influence upon crime. The

[1] For a theory of social progress, see my *Poverty and Social Progress*, New York, 1916, Chap. XXX, entitled "Social Progress and the Coming of the Normal Life."

crimes and criminals usually depicted in art are of the most exaggerated types. For example, in literature the criminal by passion is frequently represented, notwithstanding the fact that this type is comparatively infrequent in real life.[1] Detective stories almost invariably describe unusual crimes and criminals and unusual police officers and police methods of detection. In similar fashion the vices are frequently described in a highly colored fashion, the sordid details being carefully omitted.

It is easy to explain these features of the artistic and especially the literary representation of crime and vice. The exaggerated types of crime and vice are more dramatic than the common types, and crime and vice in general are more dramatic than virtue.[2] Consequently, it is not surprizing that the artist so frequently takes these exaggerated types as his subjects, and that the public finds them of absorbing interest. But this sort of an artistic treatment of crime and vice is sure to produce some evil results.

In the first place, by depicting almost exclusively the exaggerated types of crime and vice the public is given a false impression as to the true nature of the great majority of criminal and vicious acts, and as to the traits of most of the criminal and vicious persons. From literature, the drama, and other forms of art, almost nothing can be learned about the feebleminded and psychopathic types of criminals, and comparatively little about the occasional and professional criminals. Furthermore, what little can be learned is in the main inaccurate and misleading, since most of the artists have had little opportunity for firsthand observation, no scientific training, and have an exuberant and undisciplined imagination which leads them far astray in their ignorance. Since it is important that the public should have a correct understanding of the problem of crime, the influence of art in spreading misinformation is harmful.

In the second place, the glorification of crime and the criminal

[1] "Dans l'art, au contraire, le crime n'est représenté que par ses incarnations les plus typiques et les moins ordinaires. Il est rare qu'un tempérament très original ou que les exigences du public à un moment donné poussent l'artiste à éviter les sentiers battus, l'éternelle répétition du crime et du criminel par amour — les moins fréquemment observables d'ailleurs, dans la vie réelle." (E. Ferri, *Les criminels dans l'art et la littérature*, Paris, 1897, p. 2.)

[2] *Cf.* M. Guyau, *L'art au point de vue sociologique*, Paris, 1897, p. 381.

by the artist gratifies the vanity of criminals, and excites a desire for emulation on the part of would-be criminals. Speaking more broadly, such art probably has a certain amount of suggestive power, by means of which it influences some of the weaker, more suggestible individuals to imitate the acts of the criminal and vicious characters depicted in these works of art. The exact extent of this influence it is impossible to measure.

On the other hand, strange as it may seem, such art sometimes has a cathartic influence which has a slight social value. Ever since Aristotle propounded his theory of catharsis (*χάθαρσις*), it has been observed that works of art sometimes have a purgative and purifying effect in cleansing, so to speak, the individual of passions which distress him. Aristotle was, I believe, referring in particular to the ennobling effect of tragic works of art. But we may apply the same theory in a modified form to the kind of art described above. While a blood-curdling detective story may lead one boy into a life of crime, it may satisfy vicariously, so to speak, the impulses of another boy in the same direction, and thus save him from the same kind of career, or, at any rate, relieve him of the distress caused by these impulses. While a story of gambling may lead one reader to indulge in this vice, it may afford another reader sufficient relief from the same impulses to keep him from going any further in the same direction. This effect of art may be likened to a process of vaccination, inasmuch as the individual is saved from the worst forms of crime and vice by experiencing them in a milder form in works of art.

It is, of course, true that a few artists who have been accurate observers, and have had opportunities to learn, have given more or less truthful pictures of various aspects of crime and vice.[1] Furthermore, there is a large amount of artistic work whose influence is truly moral in the sense that it inspires feelings and impulses which are social in their nature. But it is doubtful if art has much influence either for or against crime and vice. Art is in the main a reflection of conditions which have been created by other forces. It furnishes a picture of those conditions to a certain extent, but is not in itself a strong dynamic force.

[1] As, for example, Dostoievsky, who had a keen insight into human nature, and had ample opportunities to observe criminals during several years of imprisonment.

The influence of art upon crime and vice raises the question of the regulation of art. Such regulation exists to a considerable extent in many parts of the civilized world, as, for example, in this country. Legal regulation of art almost always does more harm than good. Much preferable to legal regulation is the regulative influence of public opinion. And the character of this opinion is determined mainly by the conditions under which the public lives. Anti-social art and the demand for it are created mainly by evil living conditions. When human beings are able to lead a normal life in which they can express their natures spontaneously with a minimum degree of restriction, anti-social art and the demand for it will disappear almost entirely.

This fact is illustrated in many ways. Much of the anti-social art is due to the romantic impulse for adventure which seems to be deeply rooted in human nature, and which does not usually have an opportunity for expression in the prosaic life of the great majority of persons. If human life could be so ordered as to furnish ample scope for the satisfaction of this impulse in one way or another, this kind of art would at once disappear. Most of the exploitation of sex on the stage, in literature, and in other forms of art, is due to the fact that under present conditions many individuals are unable to express their sexual natures satisfactorily. If society could be so organized that practically every individual could live a normal sexual life, most of this artistic exploitation of sex would at once disappear.

So that art may be regarded as a sort of running commentary upon existing conditions. And to expend much time and effort in endeavoring to influence art is wasteful and foolish, because much more can be accomplished by attacking the underlying causes of these conditions.

The Press and Crime

Education is a powerful force in civilization which I shall discuss in a later chapter on juvenile criminality. In passing, it may be well to touch briefly upon the influence of the press. In our modern civilization a vast number of individuals, perhaps the majority of the population, read the daily newspapers and other periodicals appearing at longer intervals. These journals transmit to their readers a large amount of information (and

sometimes of misinformation), and thus constitute an important educational agency. But they may at the same time stimulate a certain amount of crime by the descriptions which they furnish of criminal acts. This is especially true of the sensational press, or so-called yellow journals, which give lurid accounts of crimes, suicides, etc. These accounts doubtless have a suggestive influence, and have led at least a few suggestible individuals to imitate these acts.

Some writers believe that the suggestive influence of the sensational press is very great and has caused many crimes.[1] It is obviously impossible to measure this influence. Occasionally a criminal act is committed in which this influence comes to light, either through the testimony of the perpetrator of the act or in some other way. Furthermore, the science of psychology has furnished ample evidence that human beings are more or less suggestible, which justifies us in assuming that sensational accounts of criminal acts will lead to a small amount of crime. But there are two reasons for believing that the above-mentioned writers have exaggerated this influence. In the first place, this influence is likely to be sufficiently strong only over very weak, suggestible individuals to lead to criminal acts. In the second place, these weak individuals are very likely to commit these acts anyway, even if they do not fall under the suggestive influence of the sensational press, for there are other suggestive influences at work which are almost certain to affect them.

As in the case of art, legal regulation of the press is almost certain in most cases to do more harm than good. The freedom of the press is one of the essential features of civilization. It goes without saying that the press, like individuals, should be subject to the laws against libel, fraudulent statements, and the incitement to crime, the justification for which will be discussed in Chapter XXVIII. Furthermore, it is permissible to restrain the press from publishing information of military value in time of war. But with these few exceptions, the only sort of

[1] As, for example, Frances Fenton, *The Influence of Newspaper Presentations upon the Growth of Crime and other Anti-Social Activity*, Chicago, 1911; E. B. Phelps, *Neurotic Books and Newspapers as Factors in the Mortality of Suicide and Crime*, in the *Bul. of the Am. Acad. of Medicine*, Vol. XII, No. 5, October, 1911.

regulation of the press as of art which can be tolerated is regulation by public opinion.[1]

The Advance of Civilization and the Increase of Crime

In the two preceding chapters and the present one I have discussed the influence upon crime of several of the most important factors in civilization, namely, the economic factors, the political factors, religion, science, art, and the press. Other aspects of civilization are dealt with elsewhere in this book. I shall now discuss briefly the influence of civilization in general upon the extent and character of crime.

It is frequently asserted that crime has increased greatly in modern times, and it is therefore concluded by some persons that modern civilization has had a harmful effect. There are many difficulties in the way of measuring the extent of crime. But so far as criminal statistics are available, they seem to indicate an increase in the extent of crime. However, this does not necessarily mean that the acts formerly stigmatized by

[1] "Le remède ne consiste pas dans un baîllon à la presse — qui reflète et ne crée pas les goûts du public et qui du reste compense largement les inconscients dommages qu'elle peut causer par les immenses avantages de la libre discussion; le remède est en nous; il est dans la réaction de toute notre énergie contre cette apothéose du mal qui va se répandant partout; il est dans une œuvre d'éducation ayant pour but de former des consciences plus équilibrées et plus saines, capables de trouver leur satisfaction dans le récit des bonnes œuvres, plutôt que dans la description d'actes atroces et lâches; il est dans notre effort pour nous élever à la hauteur de ce que notre cerveau trouve digne d'intérêt et d'étude: le travail obscur, les souffrances muettes de cette myriade de gens ignorés qui forment la multitude, et non les actions violentes ou perverses de cette aristocratie du crime qui représente heureusement une monstrueuse exception." (S. Sighele, *Littérature et criminalité*, Paris, 1908, pp. 218–219.)

"By whom art shall be supervised is quite another question. All attempts to lodge the supervision of it in any man or board have done more harm than good. By brutal suppression they consecrate the established order and turn artists into sycophants or revolutionists. Art should be the handmaiden, but it should never be made the mere bond-slave and scullion of current morality.

"It may be that the fate of the artist's work should be decided by the ten thousand influential, subject to an appeal to the million uninfluential; the latter to ban without ruth or scruple whatever gives moral offence. In this way it may be possible to make art amenable to society without making it amenable to law." (E. A. Ross, *Social Control*, p. 274.)

the law as criminal are being committed more frequently now than in the past. Owing to the great increase in the complexity of human life caused by the progress of civilization, the category of criminal acts has been greatly extended, so that it is possible to commit a much greater variety of crimes now than has been possible in the past. Furthermore, owing to the increase in the efficiency of government, many of the old criminal laws are enforced now much more rigidly than in the past. The apparent increase of crime in modern times in civilized countries is doubtless due in large part to these two factors, and may be entirely due to them.[1]

There are, however, a few ways in which the progress of civili-

[1] Hall has assembled a large number of statistics which, he believes, show that crime has increased in modern times in civilized countries. (A. C. Hall, *Crime in Its Relations to Social Progress*, New York, 1902, especially Chapters 12 to 14, inclusive.)

His conclusion with respect to the extent of crime in the future is as follows:

"The typical crimes of the most highly developed and successful nations of today are largely misdemeanors, caused by the fine legal adjustments made necessary by our ever more and more complex social life. Will this process continue forever? Will more delicate adjustments always be necessary and result in an ever-enlarging list of social prohibitions? Probably. But the rate of increase may not be as rapid in the twentieth century as it has been in the eighteenth and nineteenth. There was so much to be accomplished, and so much has now been done, to guard the rights and foster the upward growth of each and all under the laws, that we may well hope our suffering and arduous labors will make the creation of new forms of crime less necessary for our great-grandchildren; that this education through social discipline may gradually become less difficult, its lessons more easily and quickly learned. If this prove true, and if society continues to be successful in diminishing the amount of criminality under old laws, then the age of maximum crime will have been passed, and from thenceforth society will have a decreasing, rather than an increasing total of delinquency." (Pp. 374–375.)

Criminal statistics have frequently been used with more or less recklessness to show that crime is increasing or decreasing. As an example of such recklessness, see the following article: C. A. Ellwood, *Has Crime Increased in the United States Since 1880?* in the *Jour. Crim. Law*, Vol. I, No. 3, September, 1910, pp. 378–385. In this article it is concluded that serious crime has been increasing in this country. A less aggravated example is to be found in the following article: J. Goebel, Jr., *The Prevalence of Crime in the United States and Its Extent Compared with That in the Leading European States*, in the *Jour. Crim. Law*, Vol. III, No. 5, January, 1913, pp. 754–769.

It is well to beware of misleading attempts to measure precisely the extent of crime.

zation may have increased the amount of crime. Civilization has doubtless increased the complexity of human life, and may thereby have increased the nervous strain upon human beings. The available statistics seem to indicate an increase of insanity and suicide in modern times,[1] and this has probably resulted from the increase in nervous strain. In similar fashion, the added strain upon the nervous system may have led to a larger amount of crime.

A theory which has been supported by several writers is that there is a direct correlation between economic activities and criminal activities, or, as it is sometimes stated, between material prosperity and criminality. The principal exponent of this theory has been Poletti,[2] who used French statistics of imports and exports and other statistics indicating the extent of economic activities. But his own calculations seemed to indicate that the economic activities had increased far more than the criminal activities. And in any case, it is evident, as has been pointed out by Ferri,[3] that it is impossible to measure accurately the extent of economic activity, just as it is impossible to measure accurately the extent of criminal activity. For this and for other reasons Poletti's theory has been severely criticized by Ferri, Garofalo,[4] Tarde,[5] van Kan,[6] and many other criminologists.

At the same time there is a measure of truth in Poletti's theory which should be recognized. It emphasizes the fact that the increase of crime should be compared not only with the increase of population, but also with the increase of the activities of society caused by the progress of civilization. It is not surprizing that an increase in these activities, quite apart from the

[1] *Cf.* A. Corre, *Crime et suicide*, Paris, 1891.

[2] Poletti, *Il sentimento nella scienza del diritto penale*, Udine, 1882.

[3] "The mathematical or even the merely precise expression of a comparison between criminal and economic activities is impossible for the simple reason that if we could approximately fix the first term of the equation by the number of offenses prosecuted and tried, we could not, as to the second, in view of the infinite variety of elements which compose it, give even an approximate total value." (E. Ferri, *Criminal Sociology*, Boston, 1917, p. 184.)

[4] R. Garofalo, *Criminology*, Boston, 1914, pp. 166–176.

[5] G. Tarde, *La criminalité comparée*, Paris, 1886, pp. 73*ff.*

[6] J. van Kan, *Les causes économiques de la criminalité*, Paris, 1903, pp. 199–202.

increase in population, should stimulate a certain amount of crime, as, for example, the increase in commercial activities has increased the opportunities for fraud. But Poletti was not justified in assuming that such an increase in crime is necessarily permanent, for if civilization succeeds in evolving a more efficient social organization, the extent of crime may eventually be decreased relatively if not absolutely.

A similar theory, which has been suggested by certain writers, has been that the extension of personal liberty by modern civilization has afforded greater opportunity for the abuse of liberty, and has thus led to an increase in the amount of crime. This theory is sometimes used as a basis for criticisms of the modern democratic and humanitarian movement, on the ground that this movement has increased crime by weakening social control to an excessive degree. It is true that personal liberty has been greatly increased in some respects by the progress of civilization, as, for example, by the lessening of the power of kings and other autocratic rulers, by the increase of the guarantees of personal liberty by democratic and constitutional government, etc. But, on the other hand, many new restrictions have arisen, in the form of ordinances in cities and similar legislation. So that it is hard to ascertain whether modern civilization has on the whole increased or has diminished the extent of personal liberty. To say the least, it is doubtful if social control has been seriously weakened, and it is probable that its character has been changed so as to make it more effective and more beneficial to the great majority of society.

The progress of civilization has probably changed somewhat the character of crime from the violent to the cunning type. At any rate, whether or not crimes of violence have decreased, crimes of cunning are doubtless much more numerous now than crimes of violence.

The relation of crime to civilization in the future will be discussed in the final chapter of this book. It is well, however, at this point to call attention to the fact that the recent past has been a period of rapid change and progress. It may indeed be regarded as a sort of transitional period between an old and a comparatively new social system. It is, therefore, very difficult to predict from recent events as to whether crime is going to increase or decrease.

PART III

CRIMINAL TRAITS AND TYPES

CHAPTER IX

THE ORGANIC BASIS OF CRIMINALITY

Anatomical and physiological basis of criminality — The theory of the born criminal: Lombroso — The organic basis of the mental factors in criminality: instinct; feeling; intelligence — Abnormalities in the neural basis of mind — The organic causes of amentia — The organic causes of dementia, the neuroses, and abnormal appetites — Race and criminality.

HUMAN nature reveals itself in the first instance through the forms of behavior. But behavior is determined by the organic traits of the individual, and the mental states which precede every act. So that in order to understand the nature of any group of human beings it is necessary to study these organic traits and mental states.

ANATOMICAL AND PHYSIOLOGICAL BASIS OF CRIMINALITY

The primary factor in the determination of behavior is the anatomical structure. It is obvious that an animal can do only what its action system enables it to do. A bird without wings cannot fly, an animal without legs or similar locomotor organs cannot walk. And not only are the anatomical structure in general and the gross anatomical features of importance, but also the minute anatomical features, most of which are internal, such as the texture and microscopic makeup of the different parts of the organism. For example, the texture of the nervous system is one of the principal factors in the determination of the mental states.[1] Peculiarities of the texture of the nervous system doubtless explain criminal conduct in many cases.

[1] "In the cerebral cortex lies memory with its wealth of stored experiences, in this organ love, hate and fear come into being; here arise the cool deliberations of the man of science, the dreams and aspirations of the poet, the passion of the religious enthusiast, and, when abnormalities intervene, the ravings of the madman. Contrary to ancient belief, the spleen does not engender temper, nor do the affections flow from the heart. These and all other like attributes proceed from the brain." (G. H. Parker, *The Sources*

In similar fashion the physiological processes have a powerful influence upon behavior. The processes characteristic of the vascular, the respiratory, the digestive, the excretory, and the nervous systems condition and determine in the last analysis the mental states and processes. Derangements of these physiological processes are very likely to cause corresponding disturbances in the mental processes which in some cases give rise to criminal conduct.

These organic traits and processes are, therefore, of fundamental importance in the causation of criminality. There is not the space here to review in detail the extensive studies which have been made, especially by the Italian criminologists, of the anatomical and physiological traits of the criminal.[1] In the main these have been studies of external traits which are not the direct causes of conduct, while the mental traits are direct causes. However, the study of these external traits is important, and should be correlated with the study of the internal traits. This work has been misunderstood by many persons who have imagined that the criminal conduct was caused directly by these external traits, and did not realize that these traits are merely the physical stigmata of certain types of criminals.

The organic factors for criminality have been given the most weight by the criminologists who have believed that they have been able to distinguish a congenital type of criminal predestined from birth by his anatomical and physiological traits to become a criminal. This theory has received the most complete exposition in Lombroso's famous theory of the "born criminal." I shall, therefore, summarize and criticize briefly Lombroso's theory.

The Theory of the Born Criminal

Lombroso's conception of the born criminal grew out of his anatomical and physiological researches. He found certain malformations of the skeleton and of the viscera and several abnormalities in the physiological processes unusually prevalent

of Nervous Activity, in *Science*, N. S., Vol. XLV, No. 1173, June 22, 1917, pp. 620–621.)

[1] I have reviewed these studies at some length in my book entitled *The Principles of Anthropology and Sociology in Their Relations to Criminal Procedure*, New York, 1908. See especially Chap. II.

among the criminals he examined, and he arrived at the conclusion that they constituted the traits of a distinct biological and anthropological type which is prone to become criminal. He also concluded, as a result of a study of the equivalents of crime among animals and among primitive men and of the traits and conduct of children, that this congenital criminal type is to a large extent an atavistic type. That is to say, he thought that many of the distinctive traits of this type are atavistic in the sense that they revert to earlier human types and to pre-human ancestors of man.

Furthermore, Lombroso studied the mental traits of this type, and arrived at the conclusion that the born criminal is morally insane or a moral imbecile (*fou moral*). It is difficult to ascertain from the terminology used by him whether he had in mind insanity or imbecility. But inasmuch as he recognized a distinct type of insane criminal, it is probable that he considered the born criminal a moral imbecile. According to his theory, this moral defectiveness arises principally out of the weak sensibility of the born criminal, which makes it difficult for this type of criminal to feel sympathetically. He also concluded that many born criminals are epileptic, and that probably all of them are at least epileptoid in the sense that the disease is latent in them and may become active under favorable conditions. He then attempted to connect the moral imbecility and the epileptic tendency with the atavistic anatomical and physiological traits.

Lombroso's theory of the born criminal has created an enormous amount of discussion, criticism, and difference of opinion, which there is not the space to review here.[1] I shall be able merely to point out some of the main defects in the theory.

To begin with, it is obvious that there can be no "born" criminal in the literal sense of that term. No person is a criminal in the strict legal sense of the term until he has committed a criminal act, and no one could commit such an act until several years after birth. Furthermore, no person is predestined from

[1] I have gone over this ground at some length in my book entitled *The Principles of Anthropology and Sociology in Their Relations to Criminal Procedure*, New York, 1908, especially Chaps. I and II; also in my *Introduction* to the English translation of Lombroso's *Crime, Its Causes and Remedies*, Boston, 1911.

birth to become a criminal on account of his congenital traits, because criminality depends in part upon environment and social status. So that an individual with all of the distinctive traits of the "born" criminal may be born a king who is legally incapable of committing any crime, or even of doing any wrong!

On the other hand, it is doubtless true that some persons are born with traits which make them peculiarly prone to commit crimes if their environment is conducive to criminal conduct, and part of the criminal class is recruited from this group. In recognition, therefore, of these powerful congenital forces for crime, there is a measure of truth in calling them born criminals. There are, however, several egregious errors in Lombroso's theory.

Lombroso seems to have been rather ignorant of the modern science of biology, and especially of the theory of heredity. This is indicated by the loose way in which he used the term "atavism." Biologists recognize that atavism, or reversion, as they usually call it, takes place when there reappears in an individual of the present day a trait of an earlier type, provided that this reappearance is due to hereditary forces. That is to say, if primitive traits which have long remained dormant reassert themselves in the germ plasm at the time of conception, there is a true case of reversion. But a perusal of Lombroso's writings shows that many of the criminal traits which he calls atavistic are not hereditary in their origin, but are cases of arrested development either before or after birth. For example, this is the case when he speaks of degeneracy as a form of atavism, for most if not all of the traits he includes under this term are not congenital. The fact that the individual has them at birth does not indicate necessarily that they are congenital, for they may be the result of arrested development during the prenatal period of the life of the individual. In other cases he characterizes as atavistic certain habits which have been transmitted by social agencies. For example, he seems to regard the habit of tattooing as an atavistic trait, though tattooing is obviously a habit which could not possibly be transmitted by hereditary means.[1]

[1] For a detailed criticism of Lombroso's atavistic theory of crime, see L. Manouvrier, *La genèse normale du crime*, in the *Bulletins de la Société d'Anthropologie de Paris*, Vol. IV, 1893, pp. 405–458.

In fact, Lombroso's exposition of his theory of the born criminal indicates that he probably believed in the hereditary transmission of acquired traits, though he nowhere explicitly states his opinion on this point. But he again and again speaks as if habits or the effects of habits are transmitted by hereditary means. The consensus of opinion among biologists today is that no acquired traits can be transmitted by hereditary means.[1] Consequently, Lombroso was seriously in error in this respect, and this grave scientific mistake greatly vitiated the value of his theory.

Lombroso apparently believed that moral imbecility is a distinct morbid entity. This could not be so since morality is in part a social trait, but certain kinds of feeblemindedness are prone to give rise to immoral conduct. So that there is no distinct congenital immoral type, the existence of which he implied. Furthermore, he exaggerated the closeness of the relationship between epilepsy and moral imbecility, and overestimated the amount of epilepsy among criminals.

The theory of the born criminal as a biological, anthropological type is the most characteristic feature of Lombroso's classification of criminals. It is evident that there is not and could not be any such type in the strict sense of the term, and Lombroso committed some grave scientific errors in expounding his theory. However, his theory has performed a useful service in emphasizing some of the powerful hereditary factors for criminal conduct which have been overlooked by many of the writers on this subject.[2]

The Organic Basis of the Mental Factors in Criminality

The lowest animals and especially the protozoa give direct reactions to external stimuli which are called tropisms. As we go up in the animal scale, and especially as the nervous system evolves, many reflex actions appear, and then combinations of these reflexes in complex forms which are called instincts. Man, like all of the higher animals, has inherited many of these in-

[1] I have summarized the modern theory of heredity in my books entitled *The Science of Human Behavior*, New York, 1913, Chaps. III and IV; and *Poverty and Social Progress*, New York, 1916, Chap. III.

[2] See Appendix B.

stincts which furnish most if not all of the dynamic impulse to action, and form the groundwork of his behavior. According to the conditions and circumstances of the life of the individual, variations in these inherited modes of behavior are acquired which, if they become more or less fixed, are called habits.

Feeling and intelligence are two other inherited aspects of man's mental makeup which play an important part in the determination of human behavior, if not by furnishing a direct impulse to action, at any rate by influencing the direction which the instinctive impulse takes. Like all other mental phenomena, feeling is based upon the nervous system, for no manifestations, direct or indirect, of feelings have ever been observed apart from the nervous system. In all probability feelings are primarily sensations, like all impressions received through the senses. Many of the feelings, indeed perhaps all of them, are pleasurable or painful. If this is true of all of them, pleasure and pain may be the distinctive traits of feeling.

The pleasurable and painful elements in feeling are of chief importance for the determination of behavior. They are important because pain and pleasure furnish guidance for the conscious and unconscious selection of different modes of behavior. An infant who has experienced painful feelings from fire will thereafter avoid it, while the pleasures of the milk bottle will attract him. So that while the feelings do not in themselves furnish a dynamic impulse, they influence behavior greatly by encouraging or inhibiting the instinctive and reflex impulses of the organism. It may also be true that an emotion, which is a complex and highly organized state of feeling, will sometimes reënforce and strengthen a tendency to an action in order to secure the relief which comes through action. This probably happens when the emotional state involves tense or congested organic conditions which can be removed only by means of action.

The third fundamental aspect of mind is the intelligence or intellect. This aspect, like the two preceding aspects, is based upon the nervous system. It arises primarily out of the ability of the nervous system to make a record of, or to register, so to speak, the stimulations which it receives and the motor impulses which pass out along its neural paths. This record constitutes the memory, and as it grows in extent it influences behavior

more and more. When the records of these experiences are stimulated in the nervous system, they form images and ideas which inhibit or reënforce impulses to action, and furnish ends for such action. In this fashion the intelligence increases greatly the variability of behavior. Furthermore, it makes possible conscious behavior.

The physical basis of mind is neural. All of the mental phenomena which I have described, namely, the instinctive, the affective, and the intellectual phenomena, take place through the agency of the nervous system. The instincts function, in the first place, because stimuli from sense organs pass over nerve fibers to the central nerve cells which constitute the centers for the instincts in the central nervous system. These centers are probably localized mainly in the spinal cord, the medulla, and the cerebellum. The instincts function, in the second place, because impulses are sent out from these centers and travel over nerve fibers to the muscles which perform the instinctive acts. Feelings are possible only where nerve fibers are present, and probably arise mainly as a result of stimulation of the sympathetic nervous system. The intelligence is localized in the association areas of the cortex of the brain.

Consequently, inherited variations in the nervous system may give rise to exceptional strength or exceptional weakness of some of the instincts and feelings. In similar fashion, use or disuse may lead to acquired variations, which may in turn result in the accentuation or inhibition of instincts and feelings. The strength of the intellect depends largely upon the acuteness of the sense organs, the efficiency of the sensory nerve fibers, and the number and quality of the association centers in the cerebrum which are inherited. But it depends also upon the training it receives, and the ideas it acquires from its social environment. Modern neurological research has thrown much light upon the basis and mechanism of inheritance.

Numerous abnormalities manifest themselves in all of these aspects of mind. If these abnormalities exist from birth, they may be due to congenital variations. Hereditary variations may have taken place in sensory, motor, or central nerve centers which make certain instincts stronger or weaker. Or variations may have taken place in sensory or central nerve centers, or in some of the viscera, which change the nature of the feelings in

such a manner as to lead to criminal conduct. Or variations may have taken place in the cortex of the brain which weaken the intelligence.

But anatomical and physiological traits which are abnormal from the time of birth are perhaps more likely to be due to irregularities in the development previous to birth, such as are due to pressure on the brain, ill-nutrition, etc. These conditions may prevent the cerebral cortex or outer covering of the brain from developing fully. Most of the important nerve centers are to be found in the gray matter of this outer covering. Consequently, the mental makeup, and therefore the conduct of the individual, depends in large part upon the texture of this cortex. When the mind never attains its full development, a state of feeblemindedness or amentia is said to exist.

If the pathological mental condition appears after birth, it may be the result of the degeneration of a cortical substance which is caused by a cerebral disease, and which may give rise to a state of dementia. Or it may be caused by a brain tumor, or it may be the result of lesions caused by accident. Sometimes ill-nutrition or malnutrition, especially if it is experienced early in life, causes a general defective condition of the brain which manifests itself in mental abilities of a low order, and in some cases results in a positive derangement of the mental faculties which is ordinarily called insanity.

These abnormal or pathological neural conditions result in abnormal conduct of all kinds, some forms of this conduct being criminal. The excessive strength or weakness of some of the instincts may furnish a powerful impulse towards crime, or may remove a powerful restraint which acts upon most persons. In similar fashion, the excessive strength or weakness of some of the feelings may furnish a powerful impulse towards some kinds of criminal conduct, such as crimes of passion, or may remove the restraint from certain other kinds of criminal conduct.

I shall now describe briefly the organic causes of these abnormal and pathological mental states. It is a common belief that nervous diseases are inherited. This belief is probably due mainly to the fact that nervous infirmity reappears frequently in the generations of certain lines of descent. But it may have arisen in part out of the idea that, because of the

delicate and refined structure of the nervous system, and because of the great extent to which it influences conduct, very slight changes in the germ plasm may lead to rather extensive abnormalities in the nervous system and to serious functional derangements of conduct. There is doubtless a good deal of truth in both of these ideas. But it is not necessarily true that nervous infirmities as such are transmitted by heredity, or, at any rate, this may be true only of some of them. In the case of other nervous infirmities the hereditary forces may work somewhat more indirectly in causing these infirmities.

The Organic Causes of Amentia

The belief that nervous and mental infirmities are hereditary has been most prevalent with respect to congenital feeblemindedness or amentia, so that many persons believe that amentia is always inherited. This, however, is not the case. The neural basis of amentia is subnormal cerebral development. This is due in many cases to hereditary forces, but is sometimes due to environmental forces which retard the development of the brain.

Several theories as to the hereditary causes of amentia have been offered which, however, are not mutually exclusive of each other. It has been suggested that amentia may be due to diminished germinal vitality. This diminution does not necessarily cause amentia in the first generation. The neuropathic diathesis to which it gives rise may manifest itself in a polymorphic fashion in the forms of neuroses, abnormal appetites, etc. But if germinal recuperation does not take place and the vitality continues to diminish from generation to generation the result may be amentia, because, owing to the weakened germ, the cerebrum fails to develop fully. It goes without saying that this weakness of the germ need be only with respect to the parts of the germ which determine the development of the cerebrum or of the nervous system, and does not necessarily affect other parts of the germ cell.

Another theory is that amentia is due to atavism or reversion. Presumably this is due to the fact that certain parts of the germ cell which have evolved in the later stages of phylogenetic evolution and which play a part in cerebral development fail

to develop at all, or develop only partially, thus giving rise to subnormal cerebral development.

Still another theory has been to the effect that amentia is due to variations in the germ cell. Presumably these would be variations of such a nature as to omit certain parts of the germ cell essential for complete cerebral development, though it is conceivable that variations of other kinds might also give rise to amentia. Some biologists have thought that these variations are small in size but cumulative in their effect. Other biologists have thought that they are large in size and are of the nature of mutations governed by the Mendelian laws of inheritance.

These theories are not necessarily mutually exclusive of each other. This is obvious when we consider the causes of these changes in the germ cell. For example, among the causes of germinal variation which have been suggested are neuropathic inheritance, alcoholism, tuberculosis, syphilis, morbid consanguinity, etc. Diminution of germinal vitality may be the cause of a neuropathic inheritance or of alcoholism, or of any other pathological condition. Or alcoholism, tuberculosis, or syphilis may be the cause of the diminution of germinal vitality which may in turn cause the variation. So that these factors may coöperate more or less in giving rise to hereditary amentia. In view of our limited knowledge of heredity it is hardly possible to be more explicit in this analysis of the hereditary causes of amentia. But however the changes may come about, it is evident that for the amentia to be hereditary there must be changes in the germ cell which give rise to subnormal cerebral development, thus preventing mental development beyond a certain point.

But amentia may be due to changes which take place after the development of the individual has begun. Among the causes of acquired amentia are an abnormal physical condition of the pregnant mother, injuries to the fetus, abnormal child labor, traumatic injuries to the young child, toxic influences upon the young child due to toxic fluids introduced into the body or generated within the body by certain diseases, various nutritional conditions, etc. In each of these cases the development of the cerebrum is arrested to such a degree and so permanently that full mental development becomes forever impossible for that individual. It is probable that in many, perhaps

in the great majority of cases, hereditary and environmental factors combine to cause the amentia.[1]

The Organic Causes of Dementia, the Neuroses, and Abnormal Appetites

Probably most if not all of the causes of amentia which have been mentioned also act as causes of dementia. In the case of dementia, however, they act in such a fashion that they do not prevent the full development of the cerebrum, but give rise to a degenerative process after it has developed. With respect to the hereditary causes a difference in the strength of the cause may determine in some cases whether it will give rise to amentia or to dementia. In other cases differences in the quality of the hereditary factors may determine whether they will cause amentia or dementia. If the environmental factors affect the subject after full cerebral development has taken place, they cannot cause amentia, but may cause dementia.

These factors also play an important part in causing the neuroses, and in creating abnormal appetites, which lead to alcoholism, drug habits, etc. These are milder polymorphic manifestations of a process which may lead to dementia. Insanity is almost always if not inevitably a result of dementia, but may sometimes be the result of neuronic derangement which does not necessarily result in dementia. Insanity, like these other forms of mental infirmity, may be due to hereditary factors or to environmental factors, probably usually to a combination of both kinds of factors. And it is well to remember that, whether the causes are hereditary or environmental, mental infirmity always arises directly out of an abnormal and pathological condition of the neurones in the nervous system, and more particularly in the cerebrum. Clinical microscopic study has furnished many facts concerning these pathological neuronic conditions.

In fact, it is inconceivable that there are any so-called "functional" diseases which give rise to mental infirmity. By "functional" diseases are usually meant the diseases which are supposed to have no abnormal or pathological anatomical basis

[1] Tredgold is of the opinion that not more than 10 or 15 per cent of the cases of amentia are caused solely by environment. [A. F. Tredgold, *Mental Deficiency* (*Amentia*), New York, 1914, p. 37.]

in the nervous system, as distinguished from the so-called "organic" diseases which are due to lesions or other derangements of the nervous system which are definitely localized. It cannot be emphasized too strongly that the so-called functional as well as the so-called organic diseases have an anatomical basis, and that they differ from each other only in that the anatomical variations from the normal are not so extensive, or that they are much more numerous and more widely distributed, though less extensive, in functional diseases than they are in organic diseases. Furthermore, it is true that the organic disease is also a functional one in the sense that one or more organic functions must have been disturbed where the organic disease exists. So that in the last analysis there is a fundamental likeness between the organic and the functional disease, and the study of each of them involves the study of an anatomical basis and of physiological activities.

Race and Criminality

Before closing this chapter I wish to discuss briefly the relation between race and criminality. Racial variations within the human species are revealed to the eye by such external traits as skin color, form and color of the hair, shape of the features of the face, stature, etc. The existence of these external differences makes plausible a belief in internal racial differences as well. Furthermore, the obvious effects of climate and the geographical distribution of the human races, which follows in part the climatic lines, have suggested that the racial variations were due originally in large part if not entirely to climatic differences.

Some writers have accentuated the variation between the races. They have contended that not only great physical but also great mental differences exist between the races, and that these differences explain in large part the cultural differences between the peoples of the world. Some of these writers have instituted invidious comparisons between these races by rating certain of them as superior races and others of them as inferior races.[1]

It was to be expected, therefore, that the attempt would be

[1] See, for example, the writings of de Gobineau, H. S. Chamberlain, and of the so-called anthropo-sociological school such as Vacher de Lapouge and O. Ammon.

made to account for the differences in the criminality of the peoples and inhabitants of the different parts of the world by racial variation. For example, Lombroso [1] has given much weight to racial factors in the causation of criminality. He characterizes peoples as being racially inferior or racially superior. Furthermore, his theory of atavistic reversion as a cause of criminality, which I have criticized in this chapter, is closely connected with his theory of the influence of race, for he frequently implies in his writings that the atavistic traits of the criminal take the form of a reversion to the traits of an inferior race.

There is not the space to discuss at length the influence of race. Suffice it to say that in all probability this influence is not so great as is generally believed. The reason for this popular belief doubtless is that the internal, mental differences between the races are assumed to be as great as the external differences are or appear to be. But most of the external and the physical differences are not so great as they appear to be. Furthermore, the internal, mental differences are not necessarily so great as the external, physical differences. It is needless to say that by the last remark I do not mean to imply that mind is not based upon matter, and that its nature is not determined in the last analysis by its physical basis. But the physical basis of the mind is to be found in the main in the nervous system, and the color of the skin, the stature, etc., are of little importance for the nervous system.

So far as the available facts throw light upon the relative mentality of the different races, the situation seems to be somewhat as follows. No differences between the brains of the different races have been found which are sufficiently extensive or of so crucial a nature as to justify the belief that there are any great differences in the intellectual traits of the different races. Furthermore, observations which have been made of the processes of thinking of the different races indicate that these processes are much the same the world over, the apparent differences probably being explicable in large part if not entirely by cultural variations.

[1] C. Lombroso, *Crime, Its Causes and Remedies*, Boston, 1911, Part I. Chap. 3. See also his earlier discussion in his treatise on criminal man, (*L'uomo delinquente*, Vol. I; *L'homme criminel*, Vol. I.)

For similar reasons it is very doubtful if there are any material differences in the instinctive traits of the different races. The human instincts are deeply rooted not only in anthropoid but also in mammalian and vertebrate structure and organization, so that it is not to be expected that there are any material differences in these fundamental instinctive traits between the minor subdivisions of the human species.

The same is doubtless true in the main of the affective traits as well. That is to say, the states of feeling and the emotions are in their main outline the same for the different races. But there are some reasons for believing that there is more variation in the affective makeup of the different races than there is in their intellectual and instinctive traits.[1] Modern psychological study of the emotions has indicated that they are governed and determined in the main by the so-called sympathetic nervous system. This part of the general nervous system controls the internal organs. Climatic differences give rise to considerable variation in the processes of these organs. The circulation of the blood varies somewhat with variations in the temperature. In similar fashion variations arise in the assimilative and excretory processes.

It is very probable, therefore, that variations in these physiological processes react upon the sympathetic nervous system, and thus give rise to variations in the emotional states. Furthermore, it is possible that races tend to become more or less adapted to their climatic conditions by means of permanent changes in these physiological processes, thus giving rise to permanent variations in their emotional traits.

It is possible that this theory explains in large part the variation in the number of crimes against the person between hot and cold climates, which we have noted in Chapter IV. This variation would then be due in part to existing climatic differences, and in part to differences in the emotional traits of races which have been caused by climatic conditions in the past.[2]

[1] I have advanced this theory in a brief article entitled *Ethnic Factors in International Relations*, in the *Popular Science Monthly*, Vol. LXXXV, August, 1914, pp. 146–153.

[2] For an intensive study of the influence of race upon one form of crime against the person, namely, homicide, see, E. Ferri, *L'omicidio nell' antropologia criminale*, Turin, 1895, pp. 243–309.

It is to be hoped that the influence of race upon cultural phenomena in general and upon the moral phenomena in which we are particularly interested will be carefully studied in the future. In the meantime it is well to beware of extreme statements of the influence of race in which its influence is obviously or in all probability being confused with the influence of other factors.[1]

[1] For criticisms of these extreme statements see, N. Colajanni, *La sociologia criminale*, Catania, 1889, Vol. I, Chap. 6, Vol. II, Chap. 5; G. Aschaffenburg, *Crime and Its Repression*, Boston, 1913, pp. 30–51.

CHAPTER X

THE MENTAL BASIS OF CRIMINALITY

Instinct — Habit — Feeling — Intelligence — Types of mental abnormality: amentia, dementia, insanity, the neuroses, abnormal habits — The mental inadaptability of the criminal — Mental defect and moral deficiency: moral imbecility and insanity — The social maladjustment of the criminal.

In order to comprehend the mental states which lead to criminal conduct, both general and individual sources of information must be used. The general source is to be found in psychology. The science of psychology has, to be sure, developed as a result of the study of individuals. But these individuals have not usually been criminals, and the results of much of this study are of significance with respect to all kinds of human beings. The individual source of information is to be found in the study of individual criminals. The importance of this study is indicated by the fact that only by means of such study can be ascertained the peculiar features of criminal character.

Instinct

In the preceding chapter the three fundamental aspects of mind, namely, instinct, feeling, and intelligence have already been mentioned. In another work I have defined instinct in the following terms: — "*An instinct is an inherited combination of reflexes which have been integrated by the central nervous system so as to cause an external activity of the organism which usually characterizes a whole species and is usually adaptive.*" [1] The instincts are inherited modes of response to specific stimuli. Human beings possess many instincts, some of which, or combina-

[1] *The Science of Human Behavior*, New York, 1913, p. 226. In Chapters XI–XVI of that book I have described at considerable length the nature of instinct, feeling, and intelligence. That description furnishes a psychological basis for the present chapter. The reader is referred to that book for further details.

tions of which in the form of "chain instincts," are very complex. Some of the most important and complex human instincts are the instincts of pugnacity and of flight, the sexual instinct, the hunting instinct, the parental instincts; while some psychologists think that there are instincts of acquisition and of construction.

The term "instinct" is frequently misused. It is often applied to habitual modes of behavior which have been acquired and not inherited. Because of their regularity and persistence habits are frequently called instinctive by persons who do not recognize their origin. This is a grave error both for scientific and practical reasons, because the methods of influencing acquired habit and inherited instinct differ greatly. Furthermore, instinctive tendencies are often reënforced or inhibited in part or entirely by habit, and it is important to measure as accurately as possible the influence of habit upon instinct. In fact, it is probable that habit is always superimposed upon an instinctive basis, and both the scientific and the practical problem in the study of any kind of behavior is to determine to what extent it is due to hereditary factors and to what extent it is acquired.

Many general modes of behavior which have an hereditary basis, but which are in the main acquired, are called instincts, as, for example, the so-called moral, religious, patriotic, benevolent, political, and criminal instincts. These combinations of instincts and of habits may be called general innate tendencies. Among them are imitation, play, gregariousness, rivalry, workmanship, while even so general a trait as the tendency to form habits has been called a general innate tendency.

Feeling

Feeling is the most subjective part of the mental makeup. Consequently, it is more difficult to describe it in a concrete and objective manner than the other aspects of mind. It is, of course, difficult to describe any mental phenomena in concrete terms. However, instincts as tendencies towards definite modes of action involve visual, auditory, and other sensations which aid in making the concept of instinct more or less objective. The intelligence also, which we are about to discuss, contains ideas which arouse visual, auditory, and other memories which aid in making our conception of intelligence more or less concrete.

But while all persons experience feeling, and have, therefore, what is, so to speak, an intimate inner knowledge of it; to define it in terms of the external world is practically impossible, because nothing that is it or for which it stands exists in that outer world in such a form that we can receive a sense impression of it. To be sure, each person has reason to believe that feeling exists outside of himself in his fellows, because of certain traits exhibited by his fellows which by analogy with himself he regards as indirect manifestations of feeling. For example, if a fellow being exhibits a facial expression and motions which are similar to the expression and motions which accompany joyful feelings in himself, he naturally assumes that this fellow being is experiencing similar feelings. But, strictly speaking, he can have a firsthand knowledge of feeling only in himself.

Notwithstanding the highly subjective nature of feeling, several facts are known about it. Elsewhere I have stated that "*feelings are certain kinds of sensations, or, at any rate, certain aspects of certain kinds of sensations*," [1] and have suggested that the feelings may comprize and be coextensive with the painful and pleasurable sensations. But even though it is impossible to define feeling precisely, we have ample evidence in our own personal experience of its existence, and of its potent influence upon behavior. It has this influence because painful feelings tend to inhibit the acts which give rise to them, or to draw the subject experiencing them away from the stimuli which cause them; while pleasurable feelings tend to reënforce the acts which give rise to them, and to draw the subject towards the stimuli which cause them.

There are various kinds of feelings ranging from simple, highly localized feelings to complex, constitutional feelings. Some of the most complex feelings, or combinations of feelings, are called emotions. The emotions are aroused in the nervous system, and in the sympathetic nervous system in particular, apparently by the processes of the viscera and of the vascular system, and by the internal movements caused by muscular activity. Consequently, certain forms of activity, such as some of the instincts, are apparently accompanied by characteristic emotional states. Some of the most important emotions are anger, fear, jealousy, the sexual and parental emotions, etc.

[1] *Op. cit.*, p. 297.

And, just as in addition to the distinct instincts there are the general innate tendencies to action, so in addition to the distinct emotions there are general affective states such as envy, sympathy, shyness, sociability, etc.

In popular parlance it is customary to confuse some of the instincts and emotions. For example, fear is frequently spoken of as being instinctive, by which is probably meant ordinarily that it is an hereditary trait. Instincts and emotions are alike in being inherited. But instincts are inherited tendencies to action, while emotions are states of feeling, so that instincts and emotions are not identical. They are, however, closely related to each other, and the emotion of fear is probably most closely related to the instinct of flight. In similar fashion anger is frequently called an instinct, whereas it is evident that it is an emotion which is probably most closely related to the pugnacious or combative instinct.

It is important to distinguish clearly between instincts and emotions, not only for scientific but also for practical reasons. It is impossible to influence criminal conduct, or any other kind of behavior, intelligently and therefore effectively without understanding to what extent it is due to instinctive tendencies and to what extent to emotional states, because instincts and emotions must be treated in very different ways because of their radically different nature. Much intensive study is now being devoted by psychologists to the instincts and emotions, as a result of which the specific instincts and emotions will be segregated, and will be described in much greater detail than is possible at present.

Intelligence

The third fundamental aspect of mind, namely, intelligence or the intellect, plays an important part in the formation of habit and in directing conscious and unconscious behavior. Elsewhere I have said that "*in an animal with a well-developed central nervous system which has acquired a large and varied store of memories, the behavior which results from a certain stimulus may be vastly different from the purely inherited reaction which would respond to that stimulus if these memories were not present to vary and complicate the behavior. Such behavior is intelligent, and the*

capacity for such variations in behavior constitutes intelligence." [1] These memories, which are reproductions in the form of images of objects not actually present to the senses, and combinations of these memories, are ordinarily called ideas.

In every intelligent animal the behavior is greatly influenced by ideas, so that a good deal of its activity is ideo-motor. In order to understand conduct, it is important to ascertain as accurately as possible to what extent it is ideo-motor. It is not possible otherwise to measure the influence of experience, training, and learning, in other words, the influence of the environment upon the individual. Much intensive study is now being devoted by psychologists to intelligence, so that it will be possible in the future to measure more accurately the extent to which human behavior is determined by the intellect.

We can now readily perceive how necessary it is to acquaint ourselves with both the normal and the abnormal mental traits of human beings in order to understand criminal conduct. Such conduct is, in a sense, an example of failure to cope successfully with the realities of life as conditioned by the existing social régime. Failure of this sort is due sometimes to the traits of the individual, sometimes to his social conditions, but usually to a combination of both of these factors. In other words, both the hereditary and the environmental factors must be studied in order to explain these failures. For example, criminal conduct may be due to the fact that certain instincts and emotions are unusually strong or unusually weak, or that the intellect is feeble. Or it may be due to the fact that the environment has not furnished the original nature of the criminal the education and discipline needed by every individual to become fitted for life in society.

Types of Mental Abnormality

Many classifications of the types of mental abnormality have been made, and in the present stage of the study of this subject it is difficult to devize one which is satisfactory from a scientific point of view.[2] But for practical purposes the follow-

[1] *Op. cit.*, p. 265.

[2] I have discussed mental abnormality at greater length in my book entitled *Poverty and Social Progress*, New York, 1916. See especially Chapter V on the "Pathology of the Mind."

ing classification will serve, even though its divisions are not entirely mutually exclusive, and it can be criticized in other ways from a scientific point of view. (In this classification I am omitting the types of mentality which are abnormal in the sense of being much above the average, such as genius, since these types are of little significance for criminal conduct.)

1. Amentia.
2. Dementia.
3. Insanity.
4. Neuroses.
5. Alcoholism, drug habits, etc., due to abnormal appetites.

Amentia is due to subnormal cerebral development. That is to say, the brain never develops fully, so that the mentality is always seriously deficient. Dementia is due to cerebral dissolution. That is to say, after the brain has developed it degenerates, thus giving rise to mental deficiency. Bolton indicates the neural basis of these two types of mental deficiency when he says that "the essential physical basis of mental disease consists, on the one hand, in an imperfect development of the cell-laminæ of the cortex which is of the nature of a true sub-evolution, and on the other of degrees of decrease of the cell-laminæ which are of the nature of a true involution or dissolution, since such decrease in depth takes place in the converse order to that in which the cell-laminæ developed during the period of normal growth." [1] In this passage Bolton is referring, on the one hand, to amentia, and, on the other hand, to dementia.

Insanity is a rather vague and therefore difficult word to define. It obviously indicates the absence of sanity. But it does not include the abnormal mental states which constitute amentia, though it may accompany amentia. Tredgold defines insanity as "the clinical manifestation of a disturbance or perversion of neuronic function, which may or may not terminate in degeneration." [2] According to this definition insanity is a derangement of thinking and conduct due to a pathological state of the nervous system which may degenerate and give rise to dementia. Bolton defines as a necessary precursor of dementia what he calls "mental confusion," which includes "the mental

[1] J. S. Bolton, *The Brain in Health and Disease*, London, 1914, p. 37.
[2] A. F. Tredgold, *Mental Deficiency* (*Amentia*), New York, 1914, p. 9.

symptoms which occur in association with certain pathological states of the cortical neurones which may be followed by the recovery or by a more or less extensive dissolution of these elements." [1]

Both of these authorities apparently think that insanity may exist without dementia, but that insanity may develop into dementia. In the latter case, also, it goes without saying, the insanity still remains; for it is the name for the functional disturbance which arises as a result of a pathological neural state, which may consist of neuronic degeneration or may be merely a more or less temporary neural disturbance. It is a technical neurological question as to whether or not neuronic degeneration always is present in a case of insanity. There are many different kinds of insanity, some of which are prone to lead to criminal conduct.

The neuroses are more or less general neuropathic states which may or may not accompany the abnormal mental states which have so far been mentioned. Four neuroses have been distinguished and described, though their nature is still rather obscure. They are epilepsy, neurasthenia, hysteria, and psychasthenia. These neuroses under certain conditions and in various ways lead to criminal conduct.

There are many abnormal habits such as alcoholism, morphinism, and other drug habits. Whenever a person uses a narcotic or stimulant to excess, an abnormal habit exists. Consequently, there can be as many such habits as there are narcotics and stimulants. The habit may consist in the excessive use of tea, coffee, tobacco, alcohol, morphine, opium, cocaine, chloral, belladonna, hashish, bromides, chloroform, ether, etc. The habit itself is not a mental disease. Nor does it necessarily indicate the presence of a mental disease. This depends upon how the habit was acquired. A person may acquire one of these habits as a result of environmental influences, without having a previous morbid mental basis. But after acquiring the habit the excessive use of the stimulant or narcotic may and in many cases does cause a pathological neural condition, which in turn gives rise to a mental disease.

In other cases the acquisition of the habit is preceded by a morbid mental and neural condition which proves to be a good

[1] *Op. cit.*, pp. 138–9.

basis upon which the habit can grow. Just what this condition is we cannot ascertain exactly. But presumably the nerve centers are sensitive in such a way or to such a degree that the stimulant or the narcotic gives an unusual amount of satisfaction. Consequently, when the subject makes the acquaintance of the stimulant or narcotic, it arouses in him a desire and craving far surpassing that of the normal person, who desires it only to a moderate degree or not at all. Failure to overcome this craving results in the establishment of the habit, which is certain to accentuate the morbid mental and neural condition of the victim of the habit. These habits are frequently regarded as being in themselves criminal. However this may be, they often lead to criminal conduct.

The Mental Inadaptability of the Criminal

The traits characteristic of criminals at all times and places are of such a nature as to lead these individuals to violate the laws, and thus to incur the penalties for such violations. In other words, they are persons who are not well adapted to their environment, and therefore do not harmonize with it. They are unable to adapt themselves to the existing customs, standards, etc., of society. Some of these individuals cannot adjust themselves to the existing social order, but might be able to adjust themselves to another kind of society. Other criminals are constitutionally incapable of adapting themselves to any kind of social system, thus constituting a universal type of criminal.

There is a variety of reasons for the lack of social adaptability of the individuals belonging to this universal criminal type. It is determined immediately by the mental traits of the individual. But many different combinations of mental traits lead to this lack of adaptability, and it is frequently difficult to analyze the combination in a specific case.

The first type is of those who cannot adapt themselves to the existing social régime because they believe it to be wrong, but who probably could not adapt themselves to any kind of social régime. This may be due to the fact that they have enough intelligence to discern the defects in the existing régime, but they lack self restraint because of an impetuosity of temperament which leads them to act upon their belief. Or it may be due to

an intellectual instability combined with a general instability of character which makes it difficult for them to adapt themselves to any orderly system. Or it may be a combination of intellectual activity and instability with these other traits which leads them sometimes to commit crimes or to act in a manner which is regarded by society as immoral, though they themselves regard it as good.

We need not discuss here to what extent their conduct is socially harmful and to what extent it is socially useful. This question will be discussed in the last part of this book. So far as their beliefs are concerned, they are similar to many other persons who see faults in the existing social régime and would like to have them corrected. But these persons, whether it be on account of lack of courage, or for reasons of personal expediency, or because they do not believe that such conduct will help to bring about these changes, do not commit criminal acts.

This type includes not only the persons who are guilty of political crimes against the government, but also those who commit offenses against the law and violate the prevailing conventional standard of morality, such as labor agitators, suffragettes, socialists, anarchists, neo-Malthusians, free love advocates, religious agitators, and all others who violate existing legal and moral conventions in the interest of a principle or of a social movement. Some of these offenders would doubtless become law-abiding if the changes they advocate came to pass. But others of them, who are of a restless nature, would probably continue to agitate and to rebel, even if their present ends were attained.

This type is of a highly specialized kind which rarely if ever is numerous, and which should be sharply distinguished from the criminals in general. The vast majority of criminals either meditate very little or not at all upon the morality of their conduct, or frankly regard it as immoral. Despite this fact they are impelled into criminal conduct either by their mental traits or by the forces of the environment. Let us see what some of the types amongst them are, simplifying these types more than in real life for purposes of study.

A person may become criminal because of abnormal features in his instinctive makeup. This happens either because certain

instincts are unusually strong, or because they are unusually weak. For example, if the inborn pugnacious tendency is abnormally strong, it may lead to numerous acts of violence. Or if the parental instincts are weak, it may lead to neglect of offspring. If there is such a thing as an acquisitive instinct, as some psychologists think, it might, if unusually strong, lead to theft.

In similar fashion a person may become criminal because of abnormal features in his affective makeup. For example, if the feelings connected with reproduction, sex, etc., are unusually strong, they may lead to crimes of passion. If these feelings are unusually weak, the individual will lack sympathetic feelings and will not be inhibited from inflicting pain upon other persons.

The situation with respect to intelligence is somewhat different. The intelligence has no moral significance in itself. But a strong intelligence is not so likely to be associated with these abnormalities of the instinctive and affective traits. A defect of the nerve centers which control the instinctive and affective processes is also likely to be a defect of the nerve centers which control the intellectual processes. A strong intelligence is able to comprehend social standards and their justification, though, as we have seen, in some cases it will knowingly and intentionally violate these standards because it does not approve of them. A weak intelligence, on the contrary, is likely to be associated with these instinctive and affective abnormalities. Furthermore, it is more difficult for the weak intelligence to comprehend social standards and to see their justification. Consequently, the person of weak intelligence is prone to fall into immoral and criminal conduct.

Mental Defect and Moral Deficiency

When impairment of the intellect gives rise to immoral and criminal conduct, it is called moral imbecility, or moral insanity, or moral blindness. This condition is frequently described as if it is due to an impairment of a distinct moral sense. But inasmuch as no inborn moral sense exists, moral deficiency cannot be a distinct abnormal type or morbid entity. Moral imbecility or moral insanity can only be due to a disability of the intellect, or of some other part of the mental makeup, of such a

nature that it is difficult or impossible for the patient to understand moral ideas and to appreciate moral distinctions.

We must, however, distinguish between moral insanity and moral imbecility, because this distinction has great practical significance. Insanity is a mental derangement which arises after birth, though it may be traced back in part to pre-natal conditions. Many kinds of insanity give rise to moral defectiveness. The moral imbeciles are persons born mentally defective who tend towards immoral and criminal conduct. They are found in all of the grades of the mentally defective, so that there are moral idiots, moral imbeciles, and moral morons.

Tredgold has suggested that the moral imbeciles be called *amorales*, and that this type of mental deficiency be called *amorālia*.[1] Such deficiency probably characterizes the mental condition of a large proportion of those who become criminal owing to personal traits. This theory has been held by some criminologists in the past, as, for example, Lombroso, and it is interesting to note that several recent investigations reveal a rather high percentage of aments among criminals.

In order to avoid the possibility of misunderstanding it may be well to call attention specifically to the fact that criminal conduct may result from abnormal and pathological mental conditions where there is no intellectual incapacity. For example, this will happen when there is no impairment of the higher association centers, but when criminal conduct results from impairment of the sympathetic nervous system. Persons who are obviously of high intellectual capacity sometimes commit crimes of passion. Whether or not these persons are insane depends upon the definition of the word insanity, which is at best an extremely vague term.

We can now see that man's moral nature, like the rest of his mental makeup, is determined by his instinctive, affective, and intellectual traits, and his experience and training in life. Consequently, moral deficiency may be due to abnormality in any one of these traits. For example, it may be due to inability to grasp the meaning of moral ideas and standards. Or it may be due to abnormally strong impulses which cannot be restrained. Or it may be due to abnormally weak restraining powers.

[1] A. F. Tredgold, *Mental Deficiency* (*Amentia*), London, 1914, "Table of Synonyms" in the Appendix.

This excessive strength or weakness may be due to abnormally strong or abnormally weak instinctive tendencies and emotional states.

Much immorality and criminality is due to training and force of circumstances. But in any case where moral deficiency is not due merely to the immediate environment and training, but is due at least in part to congenital traits, it is due to abnormality in at least a part of the mental makeup.[1] Consequently, the so-called born criminal, of which there are several types, may be a moral imbecile, or he may have inherited abnormalities which impel him almost irresistibly towards certain kinds of criminal conduct. The insane criminal is obviously laboring under a mental disability, and there are almost as many kinds of insane criminality as there are types of insanity. The criminal by passion may commit his crime owing to peculiarities of his sympathetic nervous system.

The Social Maladjustment of the Criminal

It is now clear in what sense it is true that the criminal class is at all times and places made up in part of persons who cannot adapt themselves to organized society. But I should like to reiterate that the difference between these persons and mankind in general is only one of degree. No person can become perfectly adapted to the social system under which he lives. Every one violates moral, legal, and social conventions to a certain extent, and every person is abnormal and pathological to a certain extent. And this failure to become perfectly adapted is by no means entirely the fault of the individual, but in part of the social system, because there has never yet been and probably never will be a system of society which is perfect. However, most individuals acquire enough knowledge and develop enough self control to enable them to get along fairly well with their fellows, and to avoid violations of the conventions of society so flagrant in their nature as to bring upon them severe penalties.

[1] The English Mental Deficiency Act defines "moral imbeciles," by which it apparently means all of the moral defectives, as "persons who from an early age display some permanent mental defect coupled with strong vicious or criminal propensities on which punishment has had little or no deterrent effect."

But there always remains the group which for various reasons, is incapable of adjusting itself successfully to the social order. Consequently, its members become stigmatized as criminals. It is impossible to state accurately what proportion of the criminal class this group constitutes. It includes all of the so-called born criminals, and all of the criminals who are aments. It probably includes a goodly proportion of the criminal class, perhaps more than half.

In addition to those whose physical and mental traits make it difficult or impossible for them to adapt themselves to any social order, there are always some persons who have difficulty in adjusting themselves to the existing order, but might become adjusted to a different one. This group, however, is not likely to become large, because as it grows in size it exerts more and more influence to change the existing order. For example, in many communities in this country it has been regarded as immoral and frequently penalized by the law to do certain things on Sunday. So that the theaters have been closed and the playing of games in public has been prohibited by Sabbatarian legislation. But as the result of the incoming of many Europeans who are accustomed to the so-called "Continental" Sunday, and who have refused to regard these acts as wrong, these laws have been repealed or have become dead letters in many places, and public sentiment has gradually changed, so that it is no longer generally regarded as immoral and criminal to do these things.

In the last place, there are the persons who are not abnormal or pathological to an unusual degree, but who become criminal through the forces of the environment. This may be due to lack of education which makes it difficult for them to make their way in the world. On account of this lack of education they have not been taught moral ideas early in life, or have been taught perverted moral ideas. Inasmuch as there is no inborn moral sense, it is difficult for any one who has not had this early training to understand moral ideas or to appreciate moral distinctions, because the associations have not become established in their brains which are necessary for the proper functioning of the so-called moral faculties. From this group are recruited some of the professional criminals.

There are many other environmental factors which give rise

to crime. Many of the occasional criminals are led to commit crimes by external circumstances, and in spite of their more or less normal character. In many of these cases these circumstances have been brought into being by poverty and its attendant evils. These environmental factors for crime are described elsewhere in this book.

CHAPTER XI

CRIMINAL AMENTS

Characteristic traits of criminal aments — The measurement of mental ability — The extent of criminal amentia.

In recent years much study has been devoted to the aments, or the feebleminded, as they are ordinarily called. This study has revealed the fact that some of these feebleminded folk are morally deficient in the sense that they are intellectually incapable of grasping the meaning of moral ideas, frequently lack the self control and will power to restrain themselves from acts which are harmful to themselves or to others, and for other reasons connected with their mental defectiveness are frequently led into criminal conduct. Furthermore, numerous criminological investigations have revealed the presence of many of these aments among criminals. So that there is reason to believe that among the criminal aments are many of the so-called "born" or "instinctive" criminals, which are included in several of the classifications of criminal types.[1]

In similar fashion, these investigations have furnished conclusive evidence in support of the opinion that the "moral imbecility" or "moral insanity" of Lombroso and other crim-

[1] Healy expresses the opinion that the "born" criminal is to be found among the mentally abnormal: "The gist of the whole situation concerning 'born criminals' is that they are individuals who definitely belong in the scientific categories of mental defect and mental aberration. They show, by reason of early teaching, of environmental opportunities, of developed habit of mind, or such physical conditions as abnormal sexuality, a very definite tendency to criminalism. They are primarily mentally abnormal, and secondly, criminalistic." (William Healy, *The Individual Delinquent, Boston*, 1915, p. 782.)

Dr. Healy's book on the individual delinquent is, unfortunately, badly written and organized, and deals almost exclusively with young delinquents. But it contains a vast amount of valuable information concerning many individual criminals, and is very suggestive of the diversity of criminal types, and the great variety and complexity of the causes of their criminality.

inologists is not a distinct morbid entity, but is one phase of feeblemindedness.[1] It is, therefore, probable that the strong resemblance of "born criminality" to "moral imbecility," if not indeed their identity, which was suspected by Lombroso, may be due to the fact that both of them are manifestations of feeblemindedness.

Characteristic Traits of Criminal Aments

Aments, or feebleminded persons, become criminal because, by reason of their intellectual disability, they are unable to make their way in the economic and other activities of society, and because, if not kept under custodial care, they are likely to run foul of the law. Their intellectual disability reveals itself not only by their blundering into crime, but also by the blundering way in which they commit their crimes.

Goring, who has observed many criminals, was impressed by this fact and states it as follows: — "Unteachable, unemployable, a nuisance to themselves and everyone else, without a place in the economic régime of a law-abiding community, the position of unsupervised mental defectives is extremely forlorn, and can hardly fail, in the long run, to compel them to swell disproportionately the criminal ranks. But probably the chief source of the high degree of relationship between weak-mindedness and crime resides in the fact that the criminal thing which we call criminality, and which leads to the perpetration of many, if not of most, anti-social offences to-day, is not inherent wickedness, but natural stupidity. At any rate, we need only study the penal record of habitual criminals to realize fully that the one characteristic of the offences of 90 per cent. of the 150,000 persons convicted to prison every year — the one characteristic, apart from their intolerableness in a well-ordered society, is the incredible stupidity of these offences." [2]

But the aments are likely to become criminals not only because of their intellectual disability, but also on account of abnormalities in other parts of their mental makeup. The subnormal cerebral development characteristic of amentia is very

[1] Healy expresses the same opinion as follows: "Our own conclusion, to repeat, is simply, that if the 'moral imbecile' exists who is free from all other forms of intellectual defect, he must indeed be a *rara avis*." (*Op. cit.*, p. 788.)

[2] C. Goring, *The English Convict*, London, 1913, p. 262.

likely to affect the instincts and feelings as well as the intellect. Consequently, some of the instincts may be excessively strong or excessively weak, and the same may be true of certain of the emotions. In some of these cases the instinctive and affective abnormality is prone to stimulate criminality. For example, the emotions of anger and of jealousy may be unusually strong, thus leading to crimes of violence; or the parental, sexual, and other emotions which form the basis of the sympathetic nature of man may be weak, thus making the individual indifferent to the interests and welfare of his fellows. On account of the extreme complexity of the human mind it is very difficult to distinguish between and segregate for purposes of study the instinctive, affective, and intellectual elements. But in view of the close inter-relations between the different parts of the mind, there is good reason to believe that in most if not all cases of amentia all of these parts are affected.

The following graphic descriptions of the moral deficiency which arises from amentia indicate how it leads to crime. The first statement exaggerates somewhat the immorality of these defectives, except in the extreme cases.

Sherlock has characterized the moral defectives in the following words: —

"Clinically the signs of moral feeble-mindedness are, in a typical case, those of unqualified viciousness, by which is meant that the activities of the individual are designed to satisfy his present desires without any reference to the bearing of such a course on himself or others. Judged by the accepted standard of morals, he is purely selfish. He has no affection for his relatives, no sense of personal or family honour, and no reverence for family ties; and he will commit an offence against a member of his family as readily as against a stranger: there is thus not even a rudiment of the social instinct. In his relations with the world at large, he shows an entire lack of sympathy with man and beast, and may even be actively cruel. Altruism is entirely foreign to his nature; he is untruthful, obscene, lustful, unstable, restless, devoid of discretion, and unregulated as to his imagination. He makes no friends, and is averse from doing any work; he knows neither gratitude, shame, nor repentance, and is, as Maier found in a well-marked case, so completely impervious to reproaches and appeals that they produce in him no obvious emotional reaction, whether as regards facial expression, bodily movement, the pulse and respiration rates, or speech. To the law he is known as thief, train-

wrecker, incendiary, or murderer; or as addicted to assaults, and sexual offences of all kinds." [1]

Another writer on the feebleminded has stated the relation between feeblemindedness and criminality in the following language: —

"Every feeble-minded person is a potential criminal. This is necessarily true since the feeble-minded lacks one or the other of the factors essential to a moral life — an appreciation of right and wrong, and the power of control. If he does not know right and wrong, does not really appreciate this question, then of course he is as likely to do the wrong thing as the right. Even if he is of sufficient intelligence and has had the necessary training so that he does know, since he lacks the power of control he is unable to resist his natural impulses.

"Whether the feeble-minded person actually becomes a criminal depends upon two factors, his temperament and his environment. If he is of a quiet, phlegmatic temperament with thoroly weakened impulses he may never be impelled to do anything seriously wrong. In this case when he cannot earn a living he will starve to death unless philanthropic people provide for him. On the other hand, if he is a nervous, excitable, impulsive person he is almost sure to turn in the direction of criminality. Fortunately for the welfare of society the feeble-minded person as a rule lacks energy. But whatever his temperament, in a bad environment he may still become a criminal, the phlegmatic temperament becoming simply the dupe of more intelligent criminals, while the excitable, nervous, impulsive feebleminded person may escape criminality if his necessities are provided for, and his impulses and energies are turned in a wholesome direction." [2]

Tredgold emphasizes in particular the impulsiveness and lack of will power of the criminal aments. Speaking of the impulses of moral defectives, he says that "they take the form of an impulse to steal (kleptomania); to set things on fire such as commons, heaths, haystacks, and houses (pyromania); to mutilate horses and cattle; and, by no means rarely, to commit homicide. It is perhaps a moot point whether one should regard cases of this kind as dependent upon a disorder of association and ideation, or upon a defect of will. It may be that the impulses have such an impelling power that no ordinary volition would be capable of withstanding them, and that consequently they should be placed in a separate category, under the heading of 'morbid impulses.' On the other hand, they are frequently resisted, and when this does not occur it may be owing to a defect of will. However this may be, there is no doubt that recurrent impulses

[1] E. B. Sherlock, *The Feeble-Minded*, London, 1911, pp. 192–3.

[2] H. H. Goddard, *Feeble-Mindedness*, New York, 1914, pp. 514-515.

of this kind occur periodically and with tolerable frequency in certain aments, and that the inability to resist them brings such persons within the class of incorrigible moral defectives. It occasionally happens that the impulse is not of this definite character, there being simply a general explosiveness which causes the individual to kick over the traces on any and every occasion. Lastly, it is to be noted that neither the presence of morbid impulses nor of defective will are incompatible with a normally developed moral sense." [1]

Classifications have been devized of the aments who are likely to become criminals. For example, Sherlock classifies the moral defectives as (1) the unstable, (2) the mendacious, (3) the sexual, (4) the contentious.[2] Tredgold classifies them as (1) the morally perverse or habitual criminal type, (2) the facile type, (3) the explosive type.[3] He describes the first type in his classification as follows: — "In my experience they commit crimes, not because they are deficient in will or are passionate and excitable, like those to be presently considered, but because they are either possessed of ineradicable antisocial propensities, or really cannot appreciate the difference between right and wrong. They are, in fact, fundamentally lacking in moral sense, and this, together with the defect of judgment which is always present, causes them to be absolutely irreformable." [4]

Tredgold characterizes the second type in the following words: — "In this type of morally defective person the commission of crimes and acts of immorality does not appear to be so much due to any want of appreciation of the difference between right and wrong, or to any pronounced criminal propensities, as to the fact that the individuals are so lacking in will power as to be unable to steer a right course against resistance; they must go with the stream, and hence the extent of their criminality is dependent upon the nature of their environ-

[1] A. F. Tredgold, *Mental Deficiency* (*Amentia*), London, 1914, pp. 318–319. Tredgold also recognizes a type of defective will characterized by "a general inertia." The moral defective possessing this type of will "is facile, he simply follows the line of least resistance, and is swayed this way or that according to the happenings of the moment. It is obvious that the behaviour of such an individual will be entirely dependent upon the nature of his environment." (P. 317.)

[2] *Op. cit.*, pp. 193–196.

[3] *Op. cit.*, pp. 326–337.

[4] *Op. cit.*, p. 326.

ment." [1] The third or "explosive" type is characterized by sudden, irresistible impulses "closely resembling the motor convulsions of an epileptic." [2] This type is described in the above quotation from Tredgold.

The Measurement of Mental Ability

Let us now consider briefly the extent of amentia among criminals. In order to measure its extent accurately two things are requisite. In the first place, a scientifically exact and reliable test of mental ability must be devized. In the second place, the sample group which is examined must not be a selected one, but must be made up of individuals who have been taken at random from the criminal class in general, and who therefore truly represent the whole class.

The first of these conditions is only partially fulfilled as yet. During the last few years much effort has been devoted by psychologists to devizing satisfactory mental tests. One of the first devized is the famous Binet-Simon test, which has been several times revized by its authors and by others.[3] This test was devized largely as the result of study of school children and of abnormals in institutions. It classifies mental defectives by comparing their mental ability with that of children, and places them in the same mental age groups with children. Adults who display a mentality like that of infants from one to three years of age are classified as idiots, those who display a mentality like that of children from three to seven years of age are classified as imbeciles, and those who display a mentality like that of children from seven to twelve years of age are classified as feebleminded. According to some of the psychologists who have used this test, children under ten years of age who are

[1] *Op. cit.*, pp. 331–332.

[2] *Op. cit.*, p. 334.

[3] See articles by A. Binet and T. Simon in *L'annes psychologique*, Vols. XI (1905), XIV (1908), XVII (1911). Also see English translations of their works entitled *A Method of Measuring the Development of the Intelligence of Young Children*, Chicago, 1913; *Mentally Defective Children*, London, 1914. For revisions of the Binet-Simon test see H. H. Goddard, *The Binet-Simon Measuring Scale of Intelligence*, Vineland, N. J., 1911; L. M. Terman and H. G. Childs, *A Tentative Revision and Extension of the Binet-Simon Measuring Scale of Intelligence*, in the *Jour. of Educational Psychology*, Feb. to May, 1912.

mentally more than two years behind their age are feeble-minded, also children of ten years of age and over who are mentally more than three years behind their age.

Another mental test, which is of special interest to us because it was devized in the course of a study of delinquents, is the Healy test.[1] Other mental tests which might be mentioned are the de Sanctis test,[2] the Yerkes-Bridges test,[3] etc.

The second condition has not been fulfilled at all, and indeed can never be attained. It will never be possible to draw individuals at random from the criminal class in general for purposes of examination. The only persons who can be examined are those in prisons, reformatories, and elsewhere, who have fallen under the restraint of the law. These groups are highly selected with respect to mental defect, because criminal aments are much more likely to get caught by the law than other criminals. Furthermore, criminal aments are more likely to become segregated in reformatory and similar institutions than other types of criminals. So that it is to be expected that the percentage of mental defectives in these groups will always be much higher than among criminals in general. The most that can be done to obviate this difficulty is to compute roughly the degree to which these groups are selected with respect to mental defectiveness, and then discount accordingly in estimating the extent of mental defectiveness in the criminal class in general.

The fact that these two conditions have not been fulfilled doubtless accounts for the wide variation between the estimates which have so far been made, and the exaggerated size of some of these estimates. Different tests have been used and they have been applied by persons who have varied greatly in their competency to use them. The degree to which the different groups have been selected has varied greatly, but this factor has in many cases not been recognized by the investigator. Before the present state of confusion with respect to this question can

[1] W. Healy and Grace M. Fernald, *Tests for Practical Mental Classification*, in *The Psychological Monographs*, Vol. XIII, No. 2, March, 1911.

[2] S. de Sanctis, *Mental Development and the Measure of the Level of Intelligence*, in the *Jour. of Educational Psychology*, Vol. II (1911), pp. 498–507.

[3] R. M. Yerkes, J. W. Bridges and Rose S. Hardwick, *A Point Scale for Measuring Mental Ability*, Baltimore, 1915.

be removed, it will be necessary to devize a satisfactory standardized mental test, and to compute as carefully as possible the degree of selection in each group examined.[1]

The Extent of Criminal Amentia

I shall now summarize briefly several investigations of the extent of amentia among criminals.

The British Royal Commission on the Care and Control of the Feeble-minded, whose report was published in 1908, gathered a few random and rather unreliable statistics with respect to the number of mentally defective persons in the British penal institutions. For example, the medical officer of the Pentonville prison expressed the opinion that "there are not less than 20 per cent of the prisoners who show signs of mental inefficiency." [2] The medical inspector of the Prison Commission expressed the opinion that in the local prisons at least 3 per cent of the prison population should be returned as mentally defective.[3] Such opinions are of little value unless accompanied by definite figures of the number of persons examined, and a description of the kind of examination or test applied.

It was also ascertained by the Commission that "sixteen per cent. of the patients at the State criminal lunatic asylum at Broadmoor were 'cases of congenital or infantile mental deficiency — the proportion of both sexes being about the same.'" [4] The medical investigators of the Commission visited local prisons, casual wards, shelters, etc., and saw 2,353 prisoners. Of these 242, or 10.28 per cent, were found to be mentally defective.[5]

Goring in his investigation of English convicts studied their mental capacity. It does not appear from his report that he used rigorous psychological tests. With respect to mental de-

[1] One investigator states the present situation as follows:—"We have at present no reliable means of diagnosing the grade of intelligence of the average reformatory case. Work now being done by a number of different psychologists will probably in the near future provide mental tests that will mark a big advance over present methods. A refinement of clinical procedure may also add to the solution of this problem." (F. Kuhlmann, *The Mental Examination of Reformatory Cases*, in the *Jour. Crim. Law*, Vol. V, No. 5, Jan., 1915, pp. 666–674.)

[2] *Report of the Commission*, London, 1908, Vol. VIII, p. 123.

[3] *Op. cit.*, p. 124. [4] *Op. cit.*, p. 125. [5] *Op. cit.*, p. 131.

fectiveness among criminals he came to the following conclusion: — "Accordingly, against the .45 per cent. of defectives in the general population, the proportion of mentally defective criminals cannot be less than 10 per cent., and is probably not greater than 20 per cent. It is clear that criminals, as a class, are highly differentiated mentally from the law-abiding classes."[1] He computed the following correlation coefficient between criminality and mental deficiency among the convicts he studied: — "The correlation coefficient with criminality of alcoholism is .39, of epilepsy is .26, of sexual profligacy is .31, and of mental deficiency is .64. From the high value of the last coefficient we would presume that, if reducible to one condition, it is mental defectiveness which would most likely prove to be the common antecedent of the alcoholism, epilepsy, insanity and sexual profligacy." [2]

Goring also studied the percentage of mental defectives among the persons committing the different kinds of crimes in the group of convicts covered by his investigation. He presents his results in the following table: — [3]

PERCENTAGE OF MENTAL DEFECTIVES AMONG PERSONS COMMITTING CRIMINAL OFFENSES, AND IN THE GENERAL POPULATION (948 CONVICTS)

Firing of stack	52 9
Wilful damage, including maiming of animals	22.2
Arson	16.7
Rape (child)	15.8
Robbery with violence	15.6
Unnatural (sexual) offences	14.3
Blackmail	14.3
Fraud	12.8
Stealing (and poaching)	11.2
Burglary	10.0
Murder and murderous intent	9.5
Rape (adult)	6.7
Receiving	5.1
Manslaughter	5.0
Coining	3.3
Wounding; intent to wound, striking superior officer	2.9
Embezzlement, forgery, fraudulence as trustee, bigamy, performing illegal surgical operation	0.0
General population	.5

[1] C. Goring, *op. cit.*, p. 255. [2] *Op. cit.*, p. 262.
[3] *Op. cit.*, p. 258.

Goring comments upon this table as follows: — "It is particularly interesting to note that the percentage of mentally defective murderers is nearly twice as great as the percentage of persons convicted of other forms of personal violence; that receivers of stolen goods and coiners are on the average much more intelligent than thieves; that stack-firing, which is a crime of passion, associated more highly than any other with imbecility, must be distinguished from other forms of arson, which are crimes perpetrated by persons of much higher grade of intelligence, and for motives of personal gain; that indecent assaults upon children, and unnatural sexual offences, are related to weak-mindedness much more than are crimes of rape upon adults; and that embezzlement, forgery, and all kinds of fraud are peculiarly intelligent crimes, absent in a marked manner from the records of mentally defective persons." [1]

Tredgold has studied this problem from a somewhat different point of view. Instead of studying the mental defectives among the criminals, he has studied those displaying criminal and vicious tendencies among the mentally defective. Inasmuch as he has described rigorous physiological and mental tests as being his methods of investigation, we have reason to believe that his results are worthy of much weight. He states his conclusions as follows: —

"It seems likely that the nearest approximation to the true incidence will be gained by approaching the question from another standpoint, and considering what proportion of the mentally defective evince pronounced criminal and anti-social tendencies. My investigations in Somersetshire showed that this proportion was 10 per cent., which corresponds to a total of about 13,000 moral defectives in England and Wales in the year 1906. The total number of persons tried for indictable offences during the preceding year was 61,463; on the assumption that 20 per cent. of these were mentally deficient, the number of these latter would be a little over 12,000. We shall, therefore, probably not be far wrong in saying that the number of persons in England and Wales coming within the legal definition of moral defect was between 12,000 and 13,000 in 1906." [2]

Goddard has prepared a list of sixteen reformatories and institutions for delinquents in the United States in which the number of mental defectives has been estimated. According

[1] *Op. cit.*, p. 258.
[2] A. F. Tredgold, *op. cit.*, p. 325.

to these estimates, the percentages of defectives in these institutions range from 28 per cent to 89 per cent, the higher percentages preponderating, only three of them being under 50 per cent. From this list he draws the following conclusion: — "A glance will show that an estimate of 50 per cent is well within the limit. From these studies we might conclude that at least 50 per cent. of all criminals are mentally defective." [1] He also states with respect to prostitution that "many competent judges estimate that 50 per cent of prostitutes are feeble-minded." [2] In a later work he reiterates the above conclusion by saying that "the best estimate and the result of the most careful studies indicate that somewhere in the neighborhood of 50 per cent of all criminals are feeble-minded." [3]

Goddard indicates that Binet tests were used in five of the institutions in his list, but there is no indication as to how rigorous were the tests used in the other institutions. Furthermore, there is no indication as to the extent to which the inmates of each institution were admitted as a result of an intentional or unintentional process of selection with respect to mental capacity. The number of persons examined in each case is not known. For all of these reasons Goddard's sweeping conclusion is wholly unwarranted and unjustifiable.[4]

Goddard is of the opinion that most of the feebleminded criminals have inherited their mental defectiveness. He says that "careful studies have shown beyond the peradventure of doubt that at least two-thirds of these mental defectives have inherited their defect; in other words, that they belong to strains of the human family whose intelligence lies below that which is required for the performance of their duties as citizens." [5] Consequently, he thinks that the so-called "born" criminal is in reality the feebleminded criminal. "The hereditary criminal passes out with the advent of feeble-mindedness into the problem. The criminal is not born; he is made. The so-called criminal type is merely a type of feeble-mindedness, a type misunder-

[1] H. H. Goddard, *Feeble-Mindedness*, New York, 1914, p. 9.

[2] *Op. cit.*, p. 15.

[3] *The Criminal Imbecile*, New York, 1915, p. 106.

[4] It is much to be regretted that Goddard displays a tendency to exaggerate greatly the extent of amentia. It is all the more surprizing in view of the fact that he apparently uses careful mental tests in his own investigations.

[5] *The Criminal Imbecile*, p. 106.

stood and mistreated, driven into criminality for which he is well fitted by nature. It is hereditary feeble-mindedness not hereditary criminality that accounts for the conditions. We have seen only the end product and failed to recognize the character of the raw material." [1]

Healy made a careful study of one thousand young repeated offenders. Among them he found 89 morons or high-grade feebleminded, and 8 imbeciles.[2] He comments upon these results as follows: — "As beyond peradventure feebleminded, we found about 10 per cent, but the figure will be increased as some of the younger in the lower groups fail to advance with age." [3] As to the criminal feebleminded he speaks as follows: — "Just what percentage of delinquents are feebleminded appears to be a matter of perennial interest, but well-founded statistics, even if obtained in particular places, may not be applicable to different situations. There can be no doubt that separate reformatory or prison populations if tested would show from 10 to 30 per cent or even more, to be feebleminded. . . . No essential purpose is subserved by exaggerated statements concerning the proportions which might be found in court work, or in various penal institutions." [4]

Healy also found in the same group of 1,000 young repeated offenders 81 of subnormal mentality, namely, persons possessing considerably more educability than the feebleminded; and 69 suffering from psychosis, under which term he includes insanity.[5]

Hickson examined 245 boys in the Boys' Court in Chicago and found that 207, or 84.49 per cent, were distinctly subnormal morons.[6] He used Binet-Simon and other mental tests. But the individuals he examined formed a highly selected group in which a high degree of mental defectiveness was to be expected.

Bowers examined 100 recidivists, or incorrigible habitual criminals, in the Indiana State Prison and found that 23 were

[1] *Feeble-Mindedness*, p. 8.
[2] W. Healy, *The Individual Delinquent*, New York, p. 130.
[3] *Op. cit.*, p. 140.
[4] *Op. cit.*, p. 447.
[5] *Op. cit.*, p. 139.
[6] W. J. Hickson, *The Defective Delinquent*, in the *Jour. Crim. Law*, Vol. V, No. 3, Sept., 1914, pp. 397–403.

feebleminded, 12 were insane, 38 were constitutionally inferior, 17 were psychopaths, and 10 were epileptics.[1] He does not state what tests he used. It is evident that this was a highly selected group.

Bronner examined 505 boys and girls in the Detention Home of the Juvenile Court of Cook County in Chicago, using Binet-Simon and other tests. Her conclusion is as follows: — "On the basis of a study of more than 500 cases in a group as little selected as is possible to obtain, we find the percentage of feebleminded to be less than 10 per cent., while the group of those normal in ability exceeds 90 per cent." [2]

Spaulding examined 400 women in the Massachusetts Reformatory for Women at South Framingham, Mass., using Binet-Simon, Healy, and other tests. She found that 16.8 per cent were feebleminded, and 26.8 per cent showed mental subnormality (slight mental defect). Furthermore, she found that 15.2 per cent gave a history of epilepsy, 11.0 per cent showed manifestations of hysteria, 4.0 per cent had at some time been confined in hospitals for the insane, and 7.7 per cent showed marked neuropathic or psychopathic tendencies. The abnormal mental cases represented 37.2 per cent of the whole number.[3]

Williams examined 215 boys in the Whittier State School in California, using the Stanford Revision of the Binet-Simon Measuring Scale of Intelligence. He found that 32 per cent of these 215 delinquent boys were feebleminded, and 21 per cent on the borderline.[4]

Haines examined 1,000 delinquent young boys and girls — 671 boys and 329 girls — at the Bureau of Juvenile Research, Columbus, Ohio. He found that, judged by the Binet-Simon test, 57 per cent were feebleminded; by the Yerkes-Bridges test,

[1] P. E. Bowers, *The Recidivist*, in the *Jour. Crim. Law*, Vol. V, No. 3, Sept., 1914, pp. 404–415.

[2] Augusta F. Bronner, *A Research on the Proportion of Mental Defectives among Delinquents*, in the *Jour. Crim. Law*, Vol. V, No. 4, Nov., 1914, pp. 561–568.

[3] Edith R. Spaulding, *The Results of Mental and Physical Examinations of Four Hundred Women Offenders*, in the *Jour. Crim. Law*, Vol. V, No. 5, Jan., 1915, pp. 704–717.

[4] J. H. Williams, *Intelligence and Delinquency*, in the *Jour. Crim. Law*, Vol. VI, No. 5, Jan., 1916, pp. 696–705.

29 per cent were feebleminded. He concluded finally that 24 per cent of these 1,000 cases were undoubtedly feebleminded.[1]

Rossy examined 300 criminals in the Massachusetts State Prison by the revized Yerkes-Bridges point scale. They ranged from sixteen to eighty-six years of chronological age. Of these 22 per cent (66 cases) were feebleminded; 9.6 per cent were on the borderline between amentia and normal mentality; 3.3 per cent were presumably psychotic; and 65 per cent were "not diagnosed." Of the 66 feebleminded criminals, 24 had committed sex offenses, 22 had committed crimes against property, and 20 had committed crimes against life.[2]

It is obvious that the estimates of the prevalence of amentia among criminals which have been cited vary greatly in their reliability. Some of them are incredibly high, as, for example, Goddard's minimum estimate of 50 per cent. There is reason to believe that some of these exaggerated estimates are due to defects in the Binet-Simon test, which has been widely used. This test seems to be fairly accurate up to ten years of age, or thereabouts. But it is very defective above that age. For this reason it is not well adapted for examining many of the inmates of reformatories, and tends to exaggerate the estimate of the number of mental defectives in reformatories.

But the more reliable investigations cited resulted in much lower estimates. For example, in a highly selected group Healy found 10 per cent who were unquestionably feebleminded. In a group which was probably somewhat less selected Bronner found less than 10 per cent who were feebleminded. In a highly selected group Spaulding found 16.8 per cent who were feebleminded. Two psychologists have devized a method of diagnosing feeblemindedness which they have applied to seven investigations of delinquents including 2,836 cases in all. They arrived at an estimate of 6.6 per cent feebleminded among these delinquents, which estimate is professedly tentative.[3]

[1] T. H. Haines, *Mental Examination of Juvenile Delinquents*, Publication No. 7, Ohio Board of Administration, Dec., 1915.

[2] C. S. Rossy, *Report on the First Three Hundred Cases Examined at the Massachusetts State Prison*, Mass. State Board of Insanity, Bulletin 17, Jan., 1916.

[3] R. Pintner and D. G. Paterson, *A Psychological Basis for the Diagnosis of Feeble-Mindedness*, in the *Jour. Crim. Law*, Vol. VII, No. 1, May, 1916, pp. 32–55.

It is evident, therefore, that, while the high estimates are manifestly wrong, it is not yet possible to make any reliable estimate of the number of criminal aments. The number may range somewhere between 5 and 10 per cent, but this is not much more than a guess. In view of this great uncertainty it is advisable not to arrive at any definite scientific conclusions, nor to take any practical measures upon the basis of any of these estimates.[1]

However, the investigations so far made indicate, to say the least, that amentia is much more prevalent among criminals than it is among the population at large. In another work I have made a rough minimum estimate that 0.4 per cent of the population of this country are mentally defective.[2] If we assume that one-half of 1 per cent of the total population are aments, and that a minimum of 5 per cent of the criminals are aments, it is evident that there are at least ten times as many aments proportionally among the criminals than in the general population. This rough estimate is sufficient to indicate the significance of mental defectiveness for criminality.

Among other references dealing with the subject of the application of mental tests may be mentioned the following: G. M. Whipple, *Manual of Mental and Physical Tests*, Baltimore, 1914–1915, 2 vols.; J. E. W. Wallin, *Experimental Studies of Mental Defectives*, Baltimore, 1912; E. B. Huey, *Backward and Feeble-Minded Children*, Baltimore, 1912.

[1] One investigator has stated the dangers of hasty conclusions and actions in the following words: "The present-day tendency to play fast and loose with such vague and undefined concepts as 'defective children,' 'mental deficiency,' 'mental defect,' 'defectiveness,' 'subnormality,' and 'feeble-mindedness,' 'moronity' and 'criminal imbecility,' when applied to mentalities of X (years of age) and over and to base vital practical action on diagnoses based on such vague concepts is not only inexcusable but it constitutes a positive bar to sane progress in the study of the problem of mental deviation. A recent writer recommends that adequate provision be provided 'by the state for the permanent custodial care of all committed cases of mental defect, whether or not they have a court record.' Another recent writer maintains that 'there is little doubt that the majority of criminals are mentally defective.' It would be difficult indeed to find any person who is free from every kind of 'mental defect,' or who is not to some extent 'mentally defective.' On the basis of the sweeping recommendation and generalization above it would be possible to report almost any person as a case of 'mental defect,' and thereby secure his life-long incarceration in a custodial institution." (J. E. W. Wallin, *Who is Feeble-Minded?*, in the *Jour. Crim. Law*, Vol. VI, No. 5, Jan., 1916, p. 715.)

[2] *Poverty and Social Progress*, p. 61.

CHAPTER XII

PSYCHOPATHIC CRIMINALS

The borderline between amentia and normal mentality — The borderline between amentia and dementia and insanity — Demented and insane criminals — The influence of physiological crises — Influence of bad habits, the neuroses, traumatic injuries, abnormal suggestibility, mental conflicts, etc. — Summary of mental traits prevalent among criminals.

THE psychopathic type of criminal includes all of the criminals who display more or less mental abnormality, but who are not aments.

THE BORDERLINE BETWEEN AMENTIA AND NORMAL MENTALITY

As I have already stated, there is no hard and fast line between amentia and normal mentality. Consequently, there are some individuals on or near the borderline who cannot be classified either as feebleminded or as mentally normal. Several groups may be distinguished among these individuals.

For example, there are the persons who are feebleminded in most respects, but who have special ability along one line. To this group belongs the mental defective who has unusual musical or calculating ability. Sometimes a special ability aids the defective, and sometimes it is an obstacle to him and may lead him into crime. He may possess good insight into his own defects which helps him to avoid dangers. If he possesses good motor ability, it may help him in an industrial way. On the other hand, if his general mental defectiveness leads him into crime, his good motor ability may aid him in his criminal career, and thus become a drawback. He may possess unusual ability in the use of language which aids him in lying, swindling, fraudulent litigation, etc.[1]

[1] Healy calls this the "verbalist" type of mental defective, and comments upon its significance as follows: "I know of no class of defective or abnormal individuals that is so little understood, or who can give so much social trou-

Then there are the persons who are mentally normal in most respects, but are defective in one or a few special abilities. For example, an individual may be lacking in language ability which makes it difficult for him to speak well, prevents him from learning to read and write, etc., and thus places a serious obstacle in the way of a successful career. Or his defect may be in arithmetical ability, motor ability, etc. Still more important for criminal conduct are defects in judgment, foresight, self control, etc.[1]

But most representative of the persons who cannot be classified either as feebleminded or as mentally normal are the borderline cases of individuals who have neither special abilities nor special defects, but who are slightly subnormal in the whole of their mentality without being decidedly feebleminded. These persons are hard to detect because they have no striking peculiarities. Many crimes are committed by such individuals who have succumbed to the pressure of unusually difficult circumstances, but who might have resisted this pressure successfully if they had been fully normal mentally. It is probable that many of the occasional criminals are of slightly subnormal mentality,[2] and the same may be true of some of the criminals by passion.

Furthermore, mental dullness may arise from physical conditions other than subnormal neural development, or from lack of training, and may simulate congenital subnormality. Whenever physical conditions are present which can give rise to mental dullness, careful study should be made of any possible correlation between the two. There are many such physical conditions, among them being anemia; auto-intoxication; the physiological effects of narcotics, stimulants, and excessive sex indulgence; traumatic injuries to the brain and other parts of the nervous system; etc.

ble on account of their not being understood, as the mental defectives who have language ability sufficient to make an appearance which deceives the world in general as to their true mental status. It is a type which on account of the legal problems often centering about them should be understood thoroughly by all those who have to deal with human individuals under the law." (W. Healy, *The Individual Delinquent*, Boston, 1915, p. 473.)

[1] *Cf.* W. Healy, *op. cit.*, Bk. II, Chap. 17.

[2] Lombroso probably had this group in mind when he was describing the "criminaloid," which he makes a sub-class of the occasional criminal. (See his *L'homme criminel*, Vol. II.)

The Borderline Between Amentia and Dementia and Insanity

In addition to the borderline cases between amentia and normal mentality, there are the borderline cases between amentia on the one hand and dementia and insanity on the other hand. Various names have been given to this type of mental abnormality, such as constitutional inferiority, psychopathic inferiority (*psychopathische Minderwertigkeiten*), psychopathic constitution, psychopathic personality, degeneracy (*dégênérescence supërieur*), morbid personality, etc.[1]

Healy has described the traits of the constitutionally inferior with reference to crime in the following words: — "The general characteristic of the constitutional inferior is abnormal reaction to some of the ordinary stimuli of life. Unusual emotional reactions are almost universal in the members of this class. They are often egocentric, selfish, irritable, very suggestible, easily fatigued mentally. Sometimes they are possessed by an abnormal feeling of impotence. They may be slightly defective in intelligence or have light, specialized defects of ability, but very often tests reveal neither defect nor peculiarity. Indeed some members of this class may be regarded as distinctly bright, even geniuses, although weak in power to meet the steady demands of the world. Description of such anomalous personages has often found its place in literature. Not the least feature of the symptomatology of this class of individuals is the ease with which they fall into anti-social conduct. The attraction towards misdeeds is too much for their weak inhibitory powers in many a case, or their very feeling of social impotence leads to their taking the easiest path. The ranks of vagabondage, tramp life, as may well be imagined, are recruited in considerable part from this class." [2]

It is possible that in this group are to be found most frequently the individuals who display that singular *rapprochement* between genius and insanity which has been noted by many writers. At any rate, the instability of character of the members of this group easily leads them into crime.[3]

[1] *Cf.* C. P. Oberndorf, *Constitutional Abnormality*, in the *N. Y. State Hospitals Bulletin*, Vol. II, No. 4, March, 1910, pp. 814–826.

[2] W. Healy, *op. cit.*, pp. 576–577.

[3] Anderson has suggested a classification of borderline mental cases among criminals which is not entirely satisfactory. He distinguishes the following three types: (1) The *mental defective*, by which he seems to mean the sub-

Demented and Insane Criminals

Let us now consider dementia and insanity briefly in relation to crime. As has already been noted in Chapter IX, dementia is due to neuronic degeneration, and gives rise to an insane mental state. Probably in most if not all cases a congenital neural weakness furnishes a diathesis for dementia. But whether a congenital factor is always present, or in some cases the dementia is wholly due to acquired traits, the dementia appears when the nervous system is subjected to an unusual strain, or is in a weakened condition. For example, the dementia may appear at a time of crisis such as adolescence, when dementia precox makes its appearance, or at the time of the climacteric, when presenile dementia appears, or during old age, in the form of senile dementia.

It is not possible to state with certainty whether or not insanity can exist without dementia. But it is very probable that a state of mental aberration sufficiently great to justify calling it insanity frequently exists without dementia being present. There are many kinds of insanity which may be classified in a variety of ways. For example, they may be classified with respect to their causes, such as infections, exhaustion, poisonings, auto-intoxication, glandular disturbances as in thyroid insanities, traumatic injuries, etc. Or they may be classified according to the forms they take, such as melancholia, mania, paranoia, circular psychoses, hysteria, neurasthenia, psychasthenia, etc.[1] These two kinds of classification cut across each

normal; (2) the *psychopath*, by which he seems to mean the constitutional inferior; and (3) the *delinquent type of mentality*, which is "cool and calculating, deliberate, planning out situations in advance, indolent and superficial, very selfish, egoistic, heartless and even cruel at times." The individuals belonging to the third type are reformable and their criminality is due to the fact that they "have not had at the proper stage of their development those socializing influences which produce altruistic tendencies that discipline the instincts and emotions." It is difficult to understand why this type should be regarded as a borderline type, since its criminality is, apparently, entirely acquired and not at all innate. (V. V. Anderson, *A Classification of Borderline Mental Cases amongst Offenders*, in the *Jour. Crim. Law*, Vol. VI, No. 5, Jan., 1916, pp. 689–695.

[1] The literature on mental diseases is very extensive. I will mention a few works dealing with dementia, insanity, the neuroses, abnormal habits, etc.:

J. S. Bolton, *The Brain in Health and Disease*, London, 1914.

other at many points, and are complementary to each other, since it is impossible to study insanity fully without studying both the causes and the forms of insanity. But the forms of insanity are of more direct and immediate importance for the study of crime, and I shall now indicate briefly how some of these forms of insanity lead to criminal acts.

Dementia causes a weakening of mental ability which in some cases leads to criminal conduct. Dementia precox unfits a young person for a useful career. He is incapable of holding a position, and is weak in the face of temptation. Consequently, he is likely to be led into a career of crime. Frequently he acquires bad sex habits, such as masturbation, and may drink and smoke excessively. In some cases suicide is attempted. Most of these things are true of the female as well as the male youthful dement, but the female is more likely to be led into a life of vice than the male, and is not so likely to become a criminal.

Senile dementia sometimes leads aged persons, especially old men, into such offenses as petty stealing; but especially into sex offenses, such as exhibitionism and sometimes even rape. Dementia at other periods of life may and sometimes does lead to crime and vice, but it probably has this effect most frequently in the young. However, even among the young criminals it does not appear frequently. Healy is sure that in not more than 25 cases, and probably less than that number, of 1,000 young repeated offenders which he examined carefully were there any symptoms of dementia precox.[1]

Paresis, a disease of the brain due usually if not always to syphilis, causes disturbances of the emotional life which may give rise to great irritability, and sometimes leads to delusions.

A. Church and F. Peterson, *Nervous and Mental Diseases*, Philadelphia, 1914.

T. S. Clouston, *Unsoundness of Mind*, London, 1911.

R. H. Cole, *Mental Diseases*, London, 1913.

P. Janet, *The Major Symptoms of Hysteria*, New York, 1907.

E. Kraepelin, *Lectures on Clinical Psychiatry*, New York, 1913.

R. von Krafft-Ebing, *Text Book on Insanity*, Philadelphia, 1905.

A. Meyer, *The Anatomical Facts and Clinical Varieties of Traumatic Insanity*, in the *Am. Jour. of Insanity*, Vol. LX, Jan., 1904, pp. 373–441.

E. Tanzi, *A Textbook of Mental Diseases*, New York, 1909.

[1] W. Healy, *op. cit.*, p. 594.

These mental conditions are very likely to result in minor offenses, and sometimes even in serious crimes. However, paresis results in great mental deterioration, and usually leads in course of time to dementia paralytica or general paralysis which destroys the capacity for conduct of any sort, criminal or otherwise.

Extreme melancholia is a form of insanity caused and accompanied by emotional depression and delusions and hallucinations. It frequently leads to attempts at suicide, and sometimes to murder of the members of the patient's family, setting fire to the home, etc.

Manic-depressive insanity is the form of insanity which perhaps most frequently leads to criminality. Healy has described it and has indicated how it has this effect in the following words: —"Sufferers from the excessive psychomotor exhilaration, always sooner or later followed by abnormal depression, which characterizes the manic phase of manic-depressive insanity, are sometimes criminalistic. Usually their disease is so manifest that they are taken care of comparatively early in institutions, and consequently figure but little in the courts. Quarreling, fighting, running away, unprovoked assault, and attempts to misrepresent, are the types of misdeed ordinarily seen in connection with this disease. Anti-social conduct is so readily seen to be a part of the mental disorder that diagnosis of the cause rarely presents difficulties." [1]

Paranoia is a form of insanity consisting of systematized delusions which always center around the person of the patient. These delusions arise out of ideas of persecution or of grandeur. Apart from these delusions the mind of the patient may appear to be normal. Delusions of persecution are very likely to lead to retaliatory acts for the fancied persecution. These acts may be violent in their nature, or they may take the form of fault-finding, and of litigation.[2] Delusions of grandeur are not so likely to lead to criminal acts. Paranoia is a comparatively frequent cause of anti-social conduct, and is frequently concealed under the apparently good mental capacity of the paranoiac.

[1] W. Healy, *op. cit.*, p. 602.

[2] *Cf.* B. Glueck, *The Forensic Phase of Litigious Paranoia*, in the *Jour. Crim. Law*, Vol. V, No. 3, Sept., 1914, pp. 371–386.

The Influence of Physiological Crises

In addition to the well marked psychoses which characterize the clearly defined insanities, there are other aberrational mental states which arise from physiological crises in the life of the individual, bad habits, neurotic states, traumatic injuries, etc., which may lead to aberrational conduct of a criminal nature. In these mental states the aberration is usually not so great as in the well defined psychoses, but in some cases it is quite as great.

Adolescence causes important changes in the physiological and psychological traits of the individual, so that the adolescent period is a time of stress and change. Especially important is the maturing of the sexual nature at this time of life. Owing to these changes the adolescent is likely to be unusually irritable, and lacking in mental balance and self control. In some cases these conditions give rise to a slight, temporary mental aberration which does not develop into dementia, but which, while it lasts, may lead to aberrations of conduct of a criminal nature.[1] Probably most of these individuals return to normal as they grow older.

Certain crises in the life of woman in some cases lead to slight mental aberration, and in a few cases to great mental aberration. These crises are menstruation (or, more strictly speaking, ovulation), pregnancy, and to a much smaller degree the menopause. During these crises a woman's self control is usually considerably lessened, and she is prone to experience sudden impulses which she is not always able to restrain. Frequently these are impulses to commit acts which are useless to her and irrational. For example, almost all of the shop-lifting in stores is done by women. A few of these women may be professional

[1] Healy comments upon these cases as follows: "As we have noted our cases we should say that the most characteristic symptom of those who showed temporary aberrational troubles in adolescence was that of extreme incalculability, general mental incoherence. The individual frequently seems to be so played upon by varying internal impulses and environmental influences that conduct becomes utterly irrational. It would be impossible to say that the behavior reactions fall at all within the broad lines of any typical psychosis. Any one of the new characteristics, or visionary scheming, or irregularity of temper, peculiar aversions, the general unsettled feelings, the recklessness, may be expressed with enough force to be reckoned a definite mental aberration." (W. Healy, *op. cit.*, p. 652.)

thieves. But in the cases of most of them the thieving seems to be due to pathological causes, for they frequently do not need what they steal, and sometimes steal things which are unusable. A considerable proportion of these women probably are psychopathic or insane, and are very likely to feel during these crises such impulses to steal. Some of them may be entirely normal, but the mental derangement caused by one of these crises may be sufficient to give rise to an uncontrollable impulse to steal.[1]

Influence of Bad Habits, the Neuroses, Traumatic Injuries, Abnormal Suggestibility, Mental Conflicts, etc.

Certain bad habits give rise to aberrational mental states which lead to criminal conduct. The most important of these habits are alcoholism, and several drug habits. These habits lead to anti-social conduct in various ways, namely, by lessening the power of inhibition, by stimulating irresistible impulses, by giving rise to hallucinations and delusions, and in many other ways.[2]

The neuroses lead in various ways to criminal conduct. Epilepsy is characterized by outbreaks of ugly temper which readily give rise to anti-social acts of violence. Furthermore, this

[1] *Cf.* P. Dubuisson, *Les voleuses des grands magasins*, in the *Arch. d'anth. crim.*, Vol. XVI, 1901, pp. 1–20, 341–370.

Stekel gives a psychoanalytic explanation of these cases of shop-lifting. He says that "the root of all these cases of kleptomania is ungratified sexual instinct. These women fight against temptation. They are engaged in a constant struggle with their desires. They would like to do what is forbidden, but they lack the strength. Theft is to them a symbolic act. The essential point is that they do something that is forbidden, *touch* something that does not belong to them." Stekel also extends this psychoanalytic explanation of pathological stealing to other forms of kleptomania displayed by men, children, etc. (W. Stekel, *The Sexual Root of Kleptomania*, in the *Jour. Crim. Law*, Vol. II, No. 2, July, 1911, pp. 239–246.)

[2] Cooper enumerates the principal psychophysical defects of alcoholic inebriates as follows: (1) Incapacity to bear physical or mental pain; (2) Defective moral sense; (3) Defective sense of responsibility; (4) Abnormal intolerance or tolerance of alcohol; (5) Defective realization of his own abnormalities on the part of the inebriate; (6) Defective inhibition; (7) Defective mental equilibrium. It is evident that such defects may very readily lead to anti-social conduct. (J. W. Astley Cooper, *Pathological Inebriety*, New York, 1913.) See T. D. Crothers, *Criminality from Alcoholism*, in the *Jour. Crim. Law*, Vol. IV, No. 6, Mar., 1914, pp. 859–866.

neurosis is generally characterized by gradual mental deterioration which is quite likely to lead to criminal conduct. Hysteria is very likely to lead to simulation, and not so much to action. Consequently, hysterics are more likely to threaten to do antisocial acts than they are to actually perform them. But they are sometimes guilty of minor offenses, such as false accusations, excessive lying, vagrancy, petty stealing, minor sex offenses, etc. Neurasthenia probably plays a part frequently in giving rise to vagrancy and mendicancy, but is not likely to lead to serious offenses. Psychasthenia may be a phase of neurasthenia, and probably does not lead frequently to crime.

Cerebral injuries frequently cause great changes in character. They give rise to instability, forgetfulness, lack of control, feelings of lassitude, intolerance for alcohol, etc., which are traits which readily lead to criminal conduct.[1]

Abnormal suggestibility frequently plays a part in leading to criminal conduct. In some cases this develops upon a psychoneurotic basis. But in many cases there is little if any pathological basis, and the suggestibility arises from a slight exaggeration or excessive stimulation of normal mental traits. This suggestibility manifests itself in various forms. There is the suggestibility of a crowd whose members under the pressure of the mob spirit will commit criminal acts which they would not think of committing at other times.[2] Then there is the response of individuals to suggestions received from newspapers, books, theaters, etc. This, however, strongly resembles the suggestibility of the crowd.

The suggestibility which is of greatest criminological significance is that of individuals to each other. There are two principal forms of this type of suggestibility. The first is dual suggestibility in which two individuals stimulate each other in an approximately equal degree to commit acts which they would not think of doing, or would not dare to do,

[1] See A. Meyer, *op. cit.*

[2] There is an extensive literature upon the psychology of the crowd. See S. Sighele, *La foule criminelle*, Paris, 1901; G. Tarde, *Les crimes des foules*, in the *Arch. d'anth. crim.*, Vol. VII, 1892, pp. 353–386; P. Aubry, *De l'influence contagieuse de la publicité des faits criminels*, in the *Arch. d'anth. crim.*, Vol. VIII, 1893, pp. 565–580; C. Binet-Sanglé, *Le crime de suggestion religieuse*, in the *Arch. d'anth. crim.*, Vol. XVI, 1901, pp. 453–473.

apart from each other.[1] The second is the response of a weaker personality to the influence of a stronger personality. In many cases the influence is sexual in its nature, in some cases it is due to a form of hero worship, but in other cases it is based upon an appeal to sordid motives.

As normal mentality is approximated, we find certain mental states giving rise sometimes to criminal conduct. A somewhat accentuated love of excitement and adventure without any neuropathic basis may lead under favoring circumstances to truancy, vagrancy, mendicancy, gambling, petty stealing, etc. Mental conflicts and repressions in normal individuals may lead to pathological lying and accusation,[2] truancy, vagrancy, arson, sex offenses, etc. The most frequent cause of these conflicts and repressions is sex,[3] because of the great difficulty of satisfying the sexual desires and needs of the individual under the maladjusted conditions created by society. Other causes for these conflicts and repressions are uncertainty concerning parentage, deceit and lies on the part of persons presumably to be trusted, etc. The literature of psychoanalysis is now throwing a flood of light upon the vast influence of these conflicts and repressions in the life of mankind, especially with relation to the sexual nature of man. This knowledge is absolutely necessary in order to bring about the social readjustment which will prevent most of these conflicts and repressions.[4]

There is not the space to describe other abnormal mental states which in some cases lead to criminal conduct. Among these are hypomania or a mild form of insanity, chorea or St. Vitus' dance, amnesic fugues or wanderings in a state of amnesia,

[1] See S. Sighele, *Le crime à deux*, Paris, 1910; E. Laurent, *Les suggestions criminelles*, in the *Arch. d'anth. crim.*, Vol. V, 1890, pp. 596–641.

[2] See W. Healy and Mary T. Healy, *Pathological Lying, Accusation, and Swindling*, Boston, 1915.

[3] "A mental conflict presupposes, of course, some emotional disturbance or else there would be no opposition between different elements of mental content or activity. Since nothing, by the innermost nature of animate beings, so stirs emotion as the affairs of sex life, taking this term in its broadest sense, it is to be presupposed that we should find most cases of mental conflict to be about hidden sex thoughts or imageries, and inner or environmental sex experiences." (W. Healy, *The Individual Delinquent*, p. 353.) This writer gives an excellent discussion of this subject in Chap. 10 of Book II of this work.

[4] See W. Healy, *Mental Conflicts and Misconduct*, Boston, 1917.

various mental states which lead to irresistible impulses such as kleptomania, pyromania, homicidal mania, etc.[1] I shall summarize the preceding discussion by means of a brief description of the mental traits prevalent among criminals.

Mental Traits Prevalent among Criminals

Lombroso and some of the other older criminologists collected a good many facts which they believed to prove that the criminal is notably lacking in physical sensibility, and is characterized by disvulnerability, or rapid recovery from wounds. These traits, they claimed, furnished the physical basis for the moral insensibility of the criminal, because physical insensibility would give rise to lack of sympathy for the sufferings of others.[2] But this theory has been severely criticized and gravely questioned by recent writers.

In the first place, physical sensibility is a very delicate thing to measure, and it is highly probable that most of the facts which have so far been collected are not sufficiently accurate to be trustworthy. In the second place, morality is a complex phenomenon which is determined by all of the principal mental traits, so that a total absence of moral sense would not be likely to arise solely from the lack of sympathetic feelings which physical insensibility might occasion. In the third place, the recent study of mental defectives has furnished considerable evidence that aments are more or less lacking in physical sensibility, so that there is some reason for believing

[1] In addition to the works which have already been cited, I will mention the following general treatises on the psychology of the criminal and of crime:

M. Benedikt, *Anatomical Studies upon Brains of Criminals*, New York, 1881.

K. Birnbaum, *Die psychopathischen Verbrecher*, Berlin, 1914.

M. Kauffmann, *Die Psychologie des Verbrechens*, Berlin, 1912.

P. Kovalevsky, *La psychologie criminelle*, Paris, 1903.

A. Kraus, *Die Psychologie des Verbrechens*, Tübingen, 1884.

R. Sommer, *Kriminalpsychologie und Strafrechtliche Psychopathologie auf naturwissenschaftlicher Grundlage*, Leipzig, 1904.

E. Wulffen, *Psychologie des Verbrechers*, Berlin, 1908, 2 vols.

[2] For a brief summary of these facts upon the physical insensibility, disvulnerability, and moral insensibility of the criminal, see H. Ellis, *The Criminal*, London, 1903, pp. 123–150.

that the physical insensibility found among criminals is characteristic of the criminal aments, but not necessarily of criminals in general. At any rate, the theory of physical insensibility resulting in moral insensibility as a universal or prevalent trait of criminals must be seriously questioned.[1] Where such moral insensibility does exist it is very likely to lead to cruelty. It also results in an incapacity for remorse.

On the intellectual side, we have seen that some criminals are feebleminded, and therefore distinctly lacking in intelligence. The intellect of other criminals is weakened by their physical conditions, or by mental disease. Some of these criminals are, to be sure, characterized by a sort of cunning. But it is a cunning which quickly over-reaches itself, and which, therefore, cannot be given a high intellectual rating. A weak intelligence naturally leads to lack of forethought which is characteristic of many criminals, and plays a part in determining many other criminal traits, some of which I am about to mention.

Laziness is characteristic of many criminals, and inordinate vanity has been noted in a good many criminals. These traits are probably due in part to intellectual defects, but perhaps more to emotional peculiarities. Emotional instability is an outstanding trait of many criminals. In its milder forms it may reveal itself as irritability, craving for excitement, etc. In its graver forms it reveals itself in irresistible impulses to commit anti-social acts. In all its forms it leads to lack of self control which is a wide-spread trait in the criminal world.[2]

[1] For a discussion of the difficulties in the way of measuring physical sensibility, see Frances A. Kellor, *Experimental Sociology, Delinquents*, New York, 1901, pp. 52–55.

For criticism of the above-mentioned theory, see E. Laurent, *Le Criminel*, Paris, 1908, pp. 27–30; W. Healy, *The Individual Delinquent*, p. 17.

[2] For graphic and concrete descriptions of the mental traits of criminals, see the following works: A. Marro, *I caratteri dei delinquenti*, Turin, 1887; A. Corre, *Les criminels*, Paris, 1889; H. Ellis, *The Criminal*, London, 1903; E. Laurent, *Les habitués des prisons de Paris*, Lyons, 1890; *Le criminel*, Paris, 1908.

Laurent, who has had an extensive experience with criminals in Paris and elsewhere, gives a graphic picture of their mental traits in his recent book. (*Le criminel*, Chap. III.) This picture is in most respects accurate, at least for the habitual inmates of prisons. I have combined in one continuous passage the following series of brief excerpts in which he describes the intelligence, imagination, feelings, passions, vanity, mythomania,

The facts presented in this chapter and the two preceding chapters indicate the complexity of the mental causes of criminality. They show the impossibility of disentangling entirely

simulation, courage, will, moral sense, remorse, religion, language, literature, art, and tattooing of criminals:

"Les criminels sont-ils intelligents? En général, ils m'ont paru d'une intelligence au-dessous de la moyenne. Imprévoyants et légers, les criminels, moins que n'importe qui, ne sont gens de lendemain. Ils vivent au jour le jour, espérant que le hasard, qui leur donne aujourd'hui du pain ou un bon coup à faire, le leur ramènera le lendemain. Si l'intelligence des criminels est peu développée, leurs facultés imaginatives le sont encore moins, et, chez un assez grand nombre, elles n'existent qu'à un état tout à fait rudimentaire.

"La sensibilité affective est considérablement émoussée chez les criminels. C'est là un fait hors de doute. Toutes les passions violentes et émanant de mauvais instincts remontent à la surface chez le criminal et le mènent. C'est de lui qu'on peut dire avec juste raison qu'il est le jouet de ses passions. Et, de cette lutte de passions qui se disputent son âme, résulte une instabilité qui fait du criminel le plus versatile des hommes. Il hait aujourd'hui qui il aimait tendrement hier, et l'ami d'aujourd'hui sera l'ennemi de demain. Et la mère de tous ces vices, c'est la paresse; la paresse, mauvaise conseillère quand l'estomac a faim; la paresse qui engendre l'ivrognerie, la luxure et la débauche; la paresse qui paralyse le bras désormais incapable de travailler et l'arme du fer homicide afin de jouir sans peine.

"La vanité joue un rôle considérable chez les individus normaux et à plus fort raison chez les criminels qui sont souvent des anormaux. Cet appétit de la notoriété, ce besoin de fanfaronnade chez les criminels développe chez eux d'une facon presque morbide l'habitude du mensonge comme chez les enfants. Quand la simulation s'associe au mensonge, à la mythomanie, le criminel arrive à la fabulation fantastique, selon les expressions de A. Trannoy. (*La mythomanie*, Paris, 1906.)

"J'ai connu bien peu de détenus courageux: quoi qu'on en ait dit et quoi qu'ils en disent, ils redoutent la souffrance, et la pensée seule de l'échafaud les fait pâlir. Aussi la volonté est, chez les criminels, une faculté rudimentaire ou atrophiée par une sorte de paralysie psychique.

"Si le criminel avait des remords, s'il avait une conscience, il ne serait pas criminel. Il pourrait quelquefois commettre un crime accidentellement, mais jamais par habitude. Je crois, avec Lombroso et H. Joly, que chez certains peuples superstitieux, les criminels ne se débarrassent pas facilement des croyances qu'on leur a inculquées des leur enfance. Ils se font sans doute des religions pleines d'accommodements et de miséricordes; mais ils ont un sentiment religieux profond et inébranlable.

"La plupart des criminels de Paris émaillent leur conversation d'un grande nombre demots empruntés à l'argot de tous les métiers et à l'argot proprement dit; ils dénaturent plus ou moins les terminaisons et les désinences des mots, mais le fond de la langue reste le même, et il est facile de les comprendre, sans même être initié.

"Tout cela a fort peu de valeur au point de vue littéraire. Mais tous ces

from each other the hereditary and acquired elements in these mental factors. They demonstrate the difficulty of classifying criminals in a brief and categorical fashion.

At the same time we must remember that the criminals who have been discussed are those who are more or less abnormal and pathological in mind. As a matter of fact, there are many more persons who commit criminal acts who are normal or almost normal. In fact practically every member of society is destined at one time or another to commit criminal acts, but the great majority are not caught at it.[1] Most of those who are caught

écrits peuvent avoir un grand intérêt pour l'étude de l'âme des criminels, qu'on voit vaniteux, cyniques, et sans goût pour la littérature et la lecture, lisant et écrivant uniquement par vanité ou par désoeuvrement, ne produisant que des compositions le plus souvent obscènes ou bien pleines d'une emphase ridicule, très rarement spirituelles, et presque toujours sans aucune élévation dans le style ni la pensée.

"J'ai eu entre les mains un grand nombre de dessins de criminels. Eh bien! jamais, au grand jamais, je n'ai pu y saisir une pensée élevée, y sentir palpiter un sentiment noble. Comment, d'ailleurs, pourraient-ils exprimer ces émotions de l'âme qu'eux-mêmes ne ressentent pas? La premiere condition pour communiquer une impression à d'autres, c'est de l'avoir ressentie soi-même. Le criminel est le plus naturaliste des artistes. Je prends le mot artiste dans un sens tout à fait conventionnel. Il rend la nature dans toute sa banalité. Il copie plus ou moins adroitement ce qu'il voit; il n'imagine rien; il n'ajoute rien, ne supprime rien. Aussi toutes ses compositions se ressemblent; toutes sont d'une navrante banalité; il est impossible d'y trouver une idée, d'y puiser une émotion.

"Le tatouage présente-t-il, chez les criminels, des caractères particuliers? A. Baer répond par la négative. 'Le tatouage, dit-il, n'a aucun lien d'origine avec l'atavisme, et moins encore avec la criminalité, car il résulte, chez les criminels, uniquement des circonstances particulières de leur vie et de leurs relations sociales.' Ce sont, en effet, à peu près les conclusions qu'on pourrait tirer de l'étude que je viens d'esquisser.

"La conclusion qui découle de cette étude anatomique et psychique des criminels! c'est qu'on peut rencontrer chez eux des séries de caractères plus ou moins constants, nullement absolus, variables suivant une foule de circonstances. Au point de vue anatomique comme au point de vue psychique, il n'y a pas plus de type criminel que de type d'aliéné. Il y a de grandes variétés de criminels comme il y a de grandes variétés d'aliénés. Quelques caractères seulement sont assez communs et permettent de les classer tous dans une même famille."

[1] Among these unconvicted persons is a genuine criminal group whose members never figure in criminal statistics. This group includes the more intelligent and skillful of the professional criminals, such as the expert forgers and counterfeiters, bank burglars, receivers of stolen goods, etc., many of whom are never caught. It should also include many persons,

belong to the occasional and professional classes of criminals, which include the vast majority of the total number of criminals.

such as fraudulent borrowers and bankrupts, confidence men, etc., who succeed in avoiding overt violations of the letter of the law, but who are committing acts which are as anti-social in their character as the majority of crimes.

Corre (*op. cit.*, pp. 329–363) recognizes this group in the fourth class of his classification of criminals:

1. Les faux criminels ou les criminels aliénés.
2. Les criminels accidentels (includes "les criminels passionels").
3. Les criminels d'état ou de profession (includes "les criminels-nés et les criminels d'habitude de divers auteurs").
4. Les criminels latents ou les faux honnêtes gens (outside of the prisons).

CHAPTER XIII

THE TYPES OF CRIMINALS

Simple classifications of criminals — Lombroso's classification — Ferri's classification — Classifications derived from Lombroso and Ferri — Garofalo's classification — Criticism of classifications of criminals — A new classification of criminal types — Description of the principal criminal types — Distribution of criminals among the criminal types.

ACCORDING to some criminologists there are biological and anthropological types of criminals. In similar fashion it is believed by some criminologists that there are psychological criminal types, owing to important differences in the mental traits of criminals. It is also believed that there are social and cultural types, owing to important differences in social status and cultural traits.

There are several rubrics according to which criminals may be classified. For example, they may be classified with respect to sex. The important differences between the sexes inevitably give rise to somewhat different criminal traits. In similar fashion the important differences between the young and adults give rise to differences between juvenile and adult criminality.

The present chapter is devoted to a discussion of the criminal types, with special reference to adult male criminals. A large part of what is stated in this chapter, however, applies to female and juvenile criminals as well, and a knowledge of it is essential to an understanding of female and juvenile criminality, which will be described in the two following chapters.

SIMPLE CLASSIFICATIONS OF CRIMINALS

The simplest classification of criminals is a twofold one.[1] Ordinarily the purpose of such a classification is to distinguish between the criminals who commit few crimes and those who commit many crimes. But these twofold classifications differ

[1] A long list of authors who have suggested a twofold classification of criminals is given by E. Ferri, *Criminal Sociology*, Boston, 1917, pp. 160*ff*.

amongst themselves in accordance with the theories of their authors as to the causes of criminality. Those who believe that there is a congenital criminal type divide criminals into (1) the born or instinctive criminals, and (2) the occasional criminals. Those who do not believe that there is a congenital criminal type, but that a criminal nature may be acquired by habit, divide criminals into (1) the habitual or professional criminals, and (2) the occasional criminals. It is obvious that a twofold classification is altogether too simple to indicate the various types of criminals.

A threefold classification has been proposed by many writers.[1] Ordinarily such a classification divides criminals into (1) the born or instinctive criminal, (2) the habitual criminal, and (3) the occasional criminal. This mode of classifying criminals solves the problem of the congenital criminal type mentioned above by recognizing both the congenital type and the habitual type. But it is out of the question to recognize an instinctive criminal, since there is no instinct of crime; while there are objections also to the use of the term "born criminal." There are also objections to the use of the term "habitual criminal," which I shall mention presently. Furthermore, a threefold classification of criminals, like a twofold classification, is not sufficiently complex to indicate the more distinct of the types of criminals. Some authors have endeavored to make the foregoing classification more adequate by adding to it the class of the insane criminals, thus making it a fourfold classification.[2]

Lombroso's Classification

Let us now turn to more systematic classifications of criminals. The development of the modern science of criminology has been

[1] For example, J. Arboux, *Les prisons de Paris*, Paris, 1881. Drähms, in his incoherent and unscientific book on the criminal, has suggested a similar classification. (A. Drähms, *The Criminal*, New York, 1900.) In his more lucid exposition and defense of Drähms' classification, Ellwood has unwittingly revealed still more clearly the absurdity of Drähms' theory. (C. A. Ellwood, *The Classification of Criminals*, in the *Jour. Crim. Law*, Vol. I, No. 4, November, 1910, pp. 536–548.) Drähms classified all types of criminals as instinctive criminals, habitual criminals, and single offenders.

[2] For example, A. Lacassagne, *Marche de la criminalité*, in the *Revue scientifique*, May 28, 1881; H. Maudsley, *Remarks on Crime and Criminals*, in the *Jour. of Mental Science*, July, 1888.

stimulated principally by the so-called positive school of criminologists, which is sometimes called the Italian school. The founder and leader during his lifetime of this school was the famous Italian criminologist, Cesare Lombroso. Throughout his long life Lombroso was engaged in numerous firsthand studies of criminals. Most of these studies were devoted to the examination and measurement of the anatomical and physiological traits of criminals. A few of them were devoted to psychological traits. As a result of these studies Lombroso formulated the following classification of criminals: — [1]

1. Born criminal.
2. Insane criminal.
3. Criminal by passion..
   a. Political criminal.
4. Occasional criminal.
   a. Pseudo-criminal.
   b. Habitual criminal.
   c. Criminaloid.

I have already summarized and briefly criticized Lombroso's theory of the born criminal in Chapter IX, so need not discuss it further at this point.

Lombroso's conception of the insane criminal is similar to that of other criminologists. He describes how the various types of insanity give rise to criminal acts. For example, homicidal mania leads to murder, pyromania to incendiarism, kleptomania to theft, etc. But some of these probably are cases of amentia rather than of insanity, and Lombroso failed to distinguish clearly between the two. This is indicated by the fact that he asserts that he found the congenital criminal type very frequently in the group of criminals which he calls insane.

The criminals by passion are characterized by a high degree of affectibility which, under the stress of unusual circumstances, gives rise to a passion which leads them to commit crimes of violence. A peculiar feature of Lombroso's theory of the criminal by passion is that the political criminal is a special kind of criminal by passion.[2] He became convinced that in most political criminals there is "an exaggerated sensibility, a veritable

[1] C. Lombroso, *L'homme criminel*, Paris, 1895, 2 vols.

[2] C. Lombroso and R. Laschi, *Le crime politique et les révolutions*, Paris, 1892, 2 vols.

hyperesthesia, as in the ordinary criminals by passion; but a powerful intellect, a great altruism push them towards ends much higher than those of the latter." [1] This is an interesting and suggestive idea which I shall discuss in the last part of this book.

The class of occasional criminals is very broad and rather diverse according to Lombroso. It includes three sub-classes. The first of these sub-classes is the group of the pseudo-criminals who commit crimes involuntarily, who are not perverse in their intentions, who commit acts which are not prejudicial to society but which are called crimes by the law, who commit crimes under extraordinary circumstances, such as for the defense of the person, of honor, or for the subsistence of a family. These pseudo-criminals are normal persons whose crimes are "rather juridical than real because they are created by imperfections of the law more than by those of men; they do not awaken any fear for the future, and they do not disturb the moral sense of the masses." [2]

The second sub-class of occasional criminals is made up of the habitual criminals, whom Lombroso characterizes as follows: — "The greatest number of these individuals is furnished by those who — normal from birth and without tendencies or a peculiar constitution for crime — not having found in the early education of parents, schools, etc., this force which provokes, or, better said, facilitates the passage from this physiological criminality — which we have seen belongs properly to early age — to a normal, honest life, fall continually into the primitive tendencies towards evil." [3] The habitual criminal is, therefore, a normal person who is led by the circumstances of his early life into a career of crime.

The third sub-class of occasional criminals is made up of the criminaloids, whom Lombroso characterizes as follows: — "These are individuals who constitute the gradations between the born criminal and the honest man, or, better still, a variety of born criminal who has indeed a special organic tendency, but one which is less intense, who has therefore only a touch of degeneracy; that is why I will call them *criminaloids*. But it is natural

[1] *L'homme criminel*, Vol. II, p. 217.
[2] *Op. cit.*, Vol. II, p. 484.
[3] *Op. cit.*, Vol. II, p. 534.

that in them the importance of the occasion determining the crime should be decisive while it is not so for the born criminal for whom it is a circumstance with which he can dispense and with which he often does dispense, as, for example, in cases of *brutal mischievousness*." [1] The criminaloid is, therefore, a transitional type between the occasional and the born criminal.

Lombroso includes many criminals in the class of occasional criminals, probably more than is advisable. Most criminologists recognize two or more distinct types among the criminals Lombroso calls occasional. His use of the term "occasional" becomes rather misleading because of the diversity of kinds of criminals to which it is applied.

Ferri's Classification

Another leader of the positive school of criminology has been and is the eminent Italian criminal sociologist, Enrico Ferri. His classification of criminals is as follows: — [2]

1. Insane criminal.
2. Born criminal.
3. Habitual criminal.
4. Occasional criminal.
5. Criminal by passion.

Ferri's classification resembles in the main that of Lombroso, and I need only mention the differences. He recognizes the habitual criminal as a distinct type. According to Ferri, the individuals belonging to this type do not have, or have only to a slight degree, the peculiar traits of the born criminal. Their first crimes are caused less by congenital tendencies than by the force of circumstances and of corrupt surroundings. But when once a crime has been committed, usually at an early age and almost always against property, they persist, especially when encouraged by the impunity which often follows their first offenses, in criminal conduct, which becomes a habit and a veritable profession. "This comes from the fact that detention in common corrupts them morally and physically, confinement in cells stupefies them, alcoholism brutalizes them, and society, abandoning them after as before their liberation, to wretchedness, idleness, and temptation, does not help them in their

[1] *Op. cit.*, Vol. II, p. 512.

[2] *Criminal Sociology*, Boston, 1917, Part I, Chap. 3.

struggle to re-enter the conditions of honest life." [1] Precocity and recidivism are the principal traits of the habitual criminal. They are characteristic of the born criminal also, but owing to different causes.

The occasional criminals, according to Ferri, are those who "have not received from nature an active tendency towards crime but have fallen into it, goaded by the temptation incident to their personal condition or physical and social environment and who do not repeat their offense if these temptations are removed." [2] But even in most of the occasional criminals there is some abnormality, though much less than in the born criminals. Of the two conditions which, according to Ferri, psychically determine crime — moral insensibility and lack of foresight — the second determines mainly the crime of occasion, while the first mainly determines habitual and congenital delinquency. The social sense, the lack of which causes moral insensibility, may be strong in the occasional criminal, but it is not seconded by a sufficiently keen prevision of the consequences of crime, and therefore yields to the external force. There are, however, those whom Lombroso has called "pseudo-criminals" who are entirely normal, and yet have committed crime involuntarily, or have done acts causing no social damage and displaying no perversity, but which nevertheless are criminal.

The criminal by passion, or by transport of passion, is, according to Ferri, an occasional criminal, but with peculiar traits which distinguish him from other occasional criminals. The criminals by passion are "individuals whose lives have previously been blameless — men of a sanguine or nervous temperament with exaggerated sensibility, quite the reverse of the born and habitual criminals. They are sometimes of a temperament closely related to that of the insane or epileptic, of which their criminal rage may be only a disguised manifestation. Most often (especially in the case of women) they commit the crime in their youth under the impulse of uncontrolled passion, like anger, jealousy, or shame." [3]

Ferri refuses to recognize the political offender as a criminal type. He asserts that the political offender is a "pseudo-criminal" and not a true criminal.[4] This idea is bound up with his

[1] *Op. cit.*, p. 146.
[2] *Op. cit.*, p. 154
[3] *Op. cit.*, p. 153.
[4] *Op. cit.*, p. 163.

theory of evolutive as contrasted with atavistic crime, which I shall discuss in Chapters XXVIII and XXIX on political and evolutive crime.

Classifications Derived From Lombroso and Ferri

Many criminologists have followed Lombroso and Ferri in their classifications of criminals, sometimes with slight modifications. For example,[1] Ellis has proposed the following classification: — (1) Political criminal, (2) Criminal by passion, (3) Insane criminal, (4) Instinctive criminal, (5) Occasional criminal, (6) Habitual criminal, (7) Professional criminal. The born criminal he calls instinctive, and explains this change of terminology in the following words: — "Lombroso and some other authorities prefer the term 'born criminal,' or 'congenital criminal' (*reo-nato*). The term 'instinctive criminal' seems to be safer, as it is not always possible to estimate the congenital element." [2] This is an insufficient reason for such a change, since instinct is as congenital as any other hereditary trait. Furthermore, I have already demonstrated that there is no instinct of crime, and that therefore it is absurd to speak of an instinctive criminal.

Ellis recognizes the professional criminal as a distinct type, whereas Lombroso and Ferri merge the professional in the habitual type. Ellis distinguishes between the two, and characterizes the professional type as follows: — "In the habitual criminal, who is usually unintelligent, the conservative forces of habit predominate; the professional criminal, who is usually intelligent, is guided by rational motives, and voluntarily takes the chances of his mode of life. . . . The professional criminal, though not of modern development, adapts himself to modern conditions. In intelligence, and in anthropological rank generally, he represents the criminal aristocracy. He has deliberately chosen a certain method of earning his living. It is a profession which requires great skill, and in which, though the risks are great, the prizes are equally great." [3]

Another classification of this kind is the following: — (1) Insane criminal, (2) Born criminal, (3) Habitual criminal, (4) Pro-

[1] H. Ellis, *The Criminal*, London, 1903, Chap. 1.
[2] *Op. cit.*, p. 17. [3] *Op. cit.*, pp. 21–22.

fessional criminal, (5) Occasional criminal, (6) Criminal by passion or accident.[1] Still another classification which resembles the above classifications, but which is badly confused in certain respects, is the following: — (1) Chance criminal, (2) Criminal by passion, (3) Criminal by opportunity, (4) Deliberate criminal, (5) Recidivist, (6) Habitual criminal, (7) Professional criminal.[2] In this classification it is difficult to distinguish between the deliberate criminal and the recidivist, between the recidivist and the habitual criminal, between the deliberate criminal and the professional criminal, etc.

Garofalo's Classification

Another leader of the positive school of criminology is the well known Italian criminologist and jurist, Raffaele Garofalo. While agreeing with Lombroso and Ferri in their positive, scientific point of view, he does not accept their classifications of criminals, and has devized, upon a psychological basis, the following classification: — [3]

1. Typical criminals or murderers.
2. Violent criminals.
    a. Endemic crimes.
    b. Crimes of passion.
3. Criminals deficient in probity.
4. Lascivious criminals.

The typical criminal is, according to Garofalo, "a man in whom altruism is totally lacking." He is characterized by complete egoism, and an absence of any sentiment of benevolence or pity and of the sentiment of justice. "Hence the same criminal will be thief or murderer as occasion arises: he will take life to satisfy his greed for money, to gain an inheritance, to rid himself of his wife that he may marry another, to put out of the way an incriminating witness, to avenge a fancied or insignificant wrong, or even to exhibit his physical dexterity, his sure eye, his firm hand, to display his contempt for the police or his hatred for men of another class." [4] The typical criminal may, there-

[1] P. A. Parsons, *Responsibility for Crime*, New York, 1909, Chap. 2.
[2] G. Aschaffenburg, *Crime and Its Repression*, Boston, 1913, pp. 198–213.
[3] R. Garofalo, *Criminology*, Boston, 1914, Part II, Chap. I.
[4] *Op. cit.*, pp. 111–112.

fore, be a thief instead of a murderer ("*assassin*"), and apparently corresponds to the born or instinctive criminal of other classifications.

The violent criminal, who is rather vaguely described by Garofalo, represents a milder form of criminality than the typical criminal. Like the typical criminal, he lacks the sentiment of benevolence or pity. There are two sub-classes of violent criminals. The first includes "the authors of such crimes against the person as may be termed *endemic*, or in other words, such crimes as constitute the special criminality of a given locality. Modern examples of this sort of criminality are found in the vendettas of the Neapolitan Camorrists or the political assassinations of the Russian Nihilists." [1] The second sub-class includes those who commit crimes under the influence of passion. "This condition 'may be habitual and represent the temperament of the individual' (Benedikt), or else may be the result of external causes, such as alcoholic liquors, high temperature, or even circumstances of a really extraordinary nature which are calculated to arouse the anger of any person, although not to quite the same degree. In the last case the criminal may closely approach the normal man." [2]

The criminals deficient in probity commit crimes against property. "Here, unquestionably, social factors are much more influential than in the preceding classes. But this fact does not always prevent us from detecting in the criminal's organism an element which preëxists any effect of environmental influence. The sentiment of probity is undoubtedly less instinctive than that of pity, or to state the matter more accurately, it is not so strictly dependent upon the organism. It is a sentiment of more modern acquisition, it represents a superposed, almost superficial, stratum of the moral sense, and consequently is less susceptible of hereditary transmission than the sentiment of pity. It lacks, moreover, that peculiarly congenital nature for which education can furnish no substitute. In a civilized society this sentiment of probity is generally the effect of examples in infancy which, continually renewed, have produced an ingrained instinct which in all probability will persist for life." [3]

The lascivious criminals ("*cyniques*") are those who commit

[1] *Op. cit.*, p. 112. [2] *Op. cit.*, pp. 115–116.
[3] *Op. cit.*, pp. 125–126.

sexual crimes, and offenses against chastity. Garofalo recognizes that these crimes are due to several different causes: — "In many cases the authors of such crimes must be assigned to the class of violent criminals. But where an extreme degree of lasciviousness is the sole motive of the offense, satyrs of this description are often found suffering from some form of alienation." [1] But there is reason to believe that he has differentiated this type of criminals too hastily. When we consider the great variety of factors which play a part in giving rise to sexual crimes, such as various psychoses and neuroses, sadism, masochism, satyriasis, nymphomania, sexual inversion, sexual fetishism, etc.; to say nothing of various factors external to the individual, such as undue repression of the normal sex instinct, alcohol, religion, etc.; it is evident that these crimes cannot be attributed to one type of criminals.

Garofalo's attempt to devize a psychological classification of criminals was commendable. But he fell far short of success. His classification is vague, it is not comprehensive, and it is not self-consistent.

Criticism of Classifications of Criminals

Let us now review briefly the classifications of criminals which have been stated. It must be evident by this time that all of them are unsatisfactory, for they all contain grave biological and psychological fallacies, no one of them is entirely self-consistent, and no one of them is sufficiently systematic and comprehensive. I will comment upon each of the distinct types differentiated in these classifications.

I have shown that there could be no born or instinctive criminal in the strict sense of those terms. It is biologically erroneous to speak of a born criminal, for criminality is a social attribute acquired after birth, and therefore could not be congenital. In similar fashion it is both biologically and psychologically erroneous to speak of an instinctive criminal, for there is not and could not be an instinct of crime. At the same time, it is true that many inherited traits become powerful forces for crime in the lives of many criminals. Some of these traits are instincts which are unusually strong, or which are unusually

[1] *Op. cit.*, p. 130.

weak, or which take an abnormal direction. Others of these traits are abnormalities of the feelings and emotions, of the intellect, etc. So that hereditary factors play an important part in the causation of crime. It is, however, probable that there are several types of criminals in which hereditary factors play a predominant part. I have shown that hereditary factors play an important part in causing the criminal conduct not only of criminal aments, but also of psychopathic criminals.

It is likewise psychologically erroneous in most if not all cases to speak of a habitual criminal. Habit exists only when through constant repetition a person acquires great facility in performing a particular action. By habitual criminal is ordinarily meant a person who commits criminal acts frequently, but not owing to inherited traits as in the case of the so-called born criminal. This person is therefore said to have acquired the habit of crime. But in many cases the habitual criminal commits many different kinds of crime. At one time he may commit a crime against the person, such as assault; at another time he may commit a crime against property, such as burglary. It is evident that he must employ different actions in these two types of crime. And even if he always commits the same type of crime, as, for example, larceny, he will under different circumstances commit the crime in different ways.

In fact, it is probable that it is an illegitimate use of the term to speak of a habitual criminal, except possibly in connection with highly specialized types of crime, such as pickpocketing in which the pickpocket may acquire great dexterity in slipping his fingers into the pockets of his victims. But even in these highly specialized crimes, different circumstances require different methods in committing the same crime, so that there can be no invariable habitual method.

The criminals ordinarily called habitual should in most cases be called professional criminals. The term professional is neither a biological nor a psychological term, but is a social and economic term. When applied to criminals it describes the persons who commit crimes repeatedly because they have been driven to do so by the force of circumstances in order to make a living, or have deliberately chosen a criminal career as the most profitable or the easiest mode of gaining a livelihood.

The insane criminal doubtless exists in the sense that many

insane persons commit criminal acts, and that these acts are frequently due to their insanity. There are, however, many kinds of insanity. Consequently, there are several kinds of insane criminals. So that it would be a mistake to regard insane criminals as constituting but one type.

There doubtless are criminals by passion, for some crimes are committed in a state of passion. There are, however, various kinds of passion, each of which arises out of an excessive excitation of one or another of the emotions, sometimes of several of them at the same time. For example, the state of passion may be due to anger, jealousy, offended self esteem, etc. Each of these is psychologically a distinct type, so that there are several types of criminals by passion.

The term occasional criminal is a more or less accurate though rather vague name for a somewhat indefinite group of criminals. It may be applied to a large group of persons who commit crimes occasionally, but not frequently, owing mainly to the force of circumstances.

A New Classification of Criminal Types

It is not easy to classify the members of any large human group, owing to the great diversity of types in any such group. In classifying criminals this difficulty is due principally to the almost infinite degree of gradation between the different types. This extensive gradation is due, on the one hand, to the large amount of variation in the traits of individual criminals, and, on the other hand, to the great variety of circumstances under which crimes are committed. The occasional criminal merges, on the one hand, into the so-called born criminal, and, on the other hand, into the professional criminal. The criminal by passion sometimes approaches certain types of the insane criminal. The criminal ament and the psychopathic criminal are closely related in some cases. There is danger, therefore, of making a classification which is so detailed that it will be helpful only to those who are able to make an intensive study.

A classification of criminals should be based in the main upon the causation of criminality, for the principal use of such a classification is to aid in planning the treatment of criminals, and this treatment must be directed primarily at the causes of

their criminality. In devizing a classification of criminals it is imperative to guard against several dangers. In the first place, no type should be included which does not actually exist, and which cannot be more or less successfully described. In the second place, no type which exists and is correctly described should be misnamed. In the third place, the classification should not be so simple as to omit any type which can be clearly distinguished. In the fourth place, the classification should not be so complex and lengthy that the types will not stand out distinctly.

We have seen that the simple classifications of criminals are not sufficiently detailed, and that each of the more complicated classifications which have been formulated contains grave errors in the description of the various types of criminals. Future classifications of criminals will depend largely upon the progress of the science of psychology. They will also depend in part upon changes in the political and economic organization of society. They may also depend to a slight extent upon changes in human nature, but extensive changes in human nature are not likely to take place.

Notwithstanding these difficulties, and on account of the great practical need for a classification of criminals, I shall propose the following classification of criminal types, formulated in accordance with the above-mentioned rules, and subject to modification by the advancement of science and human and social progress in general.

A Classification of Criminal Types

1. The criminal ament or feebleminded criminal.
2. The psychopathic criminal.
3. The professional criminal.
4. The occasional criminal.
    a. The accidental criminal.
    b. The criminal by passion.
5. The evolutive criminal.
    b. The political criminal.

Description of the Principal Criminal Types

After the extended discussion in the preceding chapters, a brief description of each of these types will be sufficient. We

have seen how amentia leads to criminality in some cases. We have also noted that two or more sub-types may be distinguished among the criminal aments. These feebleminded criminals take the place in our classification of the born and instinctive criminals of the older classifications.

All criminals who commit their crimes under the influence of a distinct psychosis are included in the psychopathic class. Among these criminals are the insane criminals of the older classifications, but owing to the vagueness of the term insanity it is preferable to call them psychopathic criminals. As our discussion has shown, there are many kinds of psychoses, so that many sub-types may be differentiated in this class. Dementia, the neuroses, abnormal appetites, etc., give rise to these psychoses.

The third class includes not only all of the professional criminals of other classifications, but also most if not all of the habitual criminals of many classifications. Many criminals have been called habitual criminals either because they are believed to have formed the habit of performing a certain kind or certain kinds of crime, or because their usual activities are criminal.[1] I have already criticized on psychological grounds the notion that a criminal can form a habit of committing certain kinds of crimes. There could be very few if any cases of this sort because of the great variety of circumstances under which crimes are committed, so that each set of circumstances requires a somewhat different manner of performing the crime. Furthermore, while the mode of life of the criminal may include various habits which are more or less peculiar to it, there is no more reason for calling it habitual than there is for calling the mode of life of the lawyer or doctor habitual rather than professional. On the whole, it is preferable to designate as professional all criminals who are not feebleminded or psychopathic, but who commit crimes repeatedly and who support themselves entirely or in part by means of their criminal conduct.

[1] "In police circles nothing is better recognized than the force of criminalistic habit, because of its intensely practical bearings. The well-known return of the offender to the old scene, to the old type of misdeed, to renewal of life with former companions; the engaging in prior occupations, the succumbing to temptations which previously won the day, are all evidences of deep-seated psychological laws." (W. Healy, *The Individual Delinquent*, p. 349.)

It must, however, be recognized that there is a good deal of diversity within the class of professional criminals as I have defined it. They vary from the intelligent, expert professionals, who reap huge profits from their criminal career, to the repeated petty offenders, who eke out a precarious existence with their petty crimes, but are too stupid and weak by birth or as a result of their experience to commit more profitable crimes.[1] They vary from those who, though not feebleminded or psychopathic, possess abnormal or pathological mental traits which have led them into a criminal career, to those who are entirely normal, but have been led into crime by their training and circumstances in life. They vary from those who have deliberately chosen a criminal career, who are the only ones recognized by many criminologists as professionals,[2] to those who have drifted into it largely through the force of circumstances, and, consequently, with little or no choice on their own part.[3]

[1] Sutherland distinguished between the "criminal recidivist" who commits major crimes and the "petty offender recidivist." He estimated that at the time he wrote there were in England 20,000 criminal recidivists and 13,000 petty offender recidivists, and in Scotland 3,000 criminal recidivists and 1,700 petty offender recidivists. (J. F. Sutherland, *Recidivism*, Edinburgh, 1908, p. 9.)

[2] See, for a statement of this point of view, W. Healy, *op. cit.*, Bk. II, Chap. 8. Healy says that "in general the criterion for discrimination of this professional class is that their criminalism is deliberate, premeditated and repeated, as compared to the type of action which is the result of the impulse of the moment." (P. 316.)

[3] The careers of a large number of professional criminals are described in T. Byrnes, *Professional Criminals of America*, New York, 1886.

Tarde has proposed the singular theory that all criminals are professional criminals, and that the criminal type is a professional type, just as the members of the so-called liberal professions represent professional types. The preceding discussion has shown the fallacy of this theory. Many of the feebleminded and psychopathic criminals are incapable of being professional criminals, while most if not all of the criminals by passion and the accidental criminals are not professionals. The class of occasional criminals is made up of individuals some of whom will become professional criminals, and others of whom will never become professionals.

Tarde's theory, however, implies the relationship between criminal and non-criminal activities which I have pointed out several times. He describes the manner in which professional criminal activities shade off into non-criminal and supposedly honest professional activities in the following words:

"If the petty criminal industry which languishes in the depths of our

The class of occasional criminals also comprizes a considerable variety of criminals. It includes all those who under the pressure of unusual circumstances, and sometimes also in part owing to slightly abnormal or pathological mental traits, commit only one or a very few crimes in the course of a lifetime. However, it also includes some persons who will eventually become professional criminals.

In this class I have also put the accidental criminals who are led to commit crimes under peculiar circumstances, and almost through no choice of their own. I have also included the criminal by passion who is not feebleminded or psychopathic, but who may possess a somewhat excitable temperament. Such a person may commit a crime, usually a crime against the person, under the pressure of unusual circumstances and under the influence of the passion aroused by those circumstances, whereas he could not be induced to commit a criminal act in any other way.

The evolutive and political criminals constitute a special type of criminal which I shall describe in the last part of this book.

towns, like so many little shops where a backward manufacture survives, does nothing but harm, the great criminal industry has had its days of great and fearful utility in the past, under its military and despotic form; and, under its financial form, people pretend that it renders appreciable services. Where would we be if there had never been any fortunate criminals, eager to overcome scruples, rights, prejudices, and customs in order to drive the human race from the pastoral poem to the drama of civilization? And must we not, unfortunately, recognize the fact that from the out and out criminal to the most honest merchant we pass through a series of transitions, that every tradesman who cheats his clients is a thief, that every grocer who adulterates his wine is a poisoner, and that, as a general thing, every man who misrepresents his merchandise is a forger? And I do not mention the great number of industries that exist more or less indirectly through the profits of crime, — low taverns, houses of prostitution, gambling houses, old-clothes shops, — which are just so many places of refuge for the receipt of stolen goods for delinquents. They have many other accomplices. Among the upper classes, how much extortion, how many doubtful bargains, how much traffic in decorations, demand the complicity of people who are rich and are reputed to be honest, who profit by them, not always without their knowledge! If the tree of crime, with all its roots and its rootlets, could ever be uprooted from our society, it would leave a giant abyss." (G. Tarde, *Penal Philosophy*, Boston, 1912, p. 255.)

Distribution of Criminals among the Criminal Types

Having described the principal criminal types, it is interesting to consider how many criminals belong to each of these types. It will be necessary first to estimate the size of the criminal class as a whole.

It is obviously impossible to count the total number of criminals, because many of them are never caught. Furthermore, criminal statistics available for making an estimate of the number of criminals are not so numerous nor so good as they would be if the proper governmental agencies kept adequate records of arrests, trials, convictions, penalties, population of penal institutions, etc. This is especially true in this country.[1]

It is necessary, in the first place, to decide whom we are to include in the criminal population. If we include all persons who have committed illegal acts, we shall have to stigmatize as criminal the vast majority of the total population, as I have already pointed out. Or if we include all those who have been caught and convicted, we shall have to stigmatize as criminal many persons each of whom has committed a single offense, usually petty in its character, but has pursued a law-abiding career during the remainder of his life.[2] It is obvious that neither of these methods is desirable.

[1] The inadequacy of these statistics is discussed by L. N. Robinson, *History and Organization of Criminal Statistics in the U. S.*, Boston, 1911.

[2] The most careful estimate of this sort of which I know has been made by Finkelnburg in Germany. (K. Finkelnburg, *Die Bestraften in Deutschland*, Berlin, 1912.) This writer calculated the number of persons who had been convicted of crime in the population of Germany on the basis of the criminal statistics of the German Empire since 1882 and the census of the population of the German Empire in December, 1910. After making all of the necessary deductions for death, emigration, foreign citizenship, etc., he concluded that out of every 11.7 persons 12 years of age or over, one person had been convicted of crime. (Pp. 32–33.) Furthermore, he calculated that out of every 212.7 girls 12 years of age or over up to 18 years of age, one girl had been convicted of crime; out of every 42.7 boys 12 years of age or over up to 18 years of age, one boy had been convicted of crime; out of every 24.6 women 18 years of age or over, one woman had been convicted of crime; and out of every 6.2 men 18 years of age or over, one man had been convicted of crime.

Goring has made a similar estimate for male offenders in England, but has gone still further and has included also those persons in the present population who will commit crimes in the future. He has estimated that

In the criminal population should be included only those who at the given time and place menace society with anti-social acts which the law has made illegal. In the first place, there should be included those who on account of grave abnormal and pathological traits have committed crimes and are likely to commit more of them in the future, namely, the feebleminded and psychopathic criminals. In the second place, there should be included all the professional criminals, whether abnormal or normal, and whether they have adopted a criminal career voluntarily or have drifted into it largely through force of circumstances. In the third place, there should be included the accidental and occasional criminals and the criminals by passion of the moment, that is to say, those who have committed crimes by accident, occasion, and passion within the very recent past, as, for example, during the past year. Those who have committed criminal acts in the more distant past, but are not likely to commit any more crimes, can hardly be said to menace society, and should therefore not be included in the criminal population. If they were included, this method could not be a true measure of the criminality of the community.

The size of each of these groups must be determined, in the first place from the available statistics of criminals who are caught. Then if there are any data on the basis of which it is possible to make an estimate of the number of criminals who are

the total population of male offenders, both prior and subsequent to conviction, in England and Wales, is 3,110,500; of whom the population prior to conviction (eventual offenders) is 1,115,490, and the population subsequent to conviction (manifest offenders) is 1,995,010. (C. Goring, *The English Convict*, London, 1913, p. 234.)

Goring does not state the exact date at which his estimate held good. Presumably it was at about the time of publication of his report. Nor does he state the ratio between the criminal male population and the total male population. For these reasons it is impossible to make an accurate comparison between the Finkelnburg and the Goring estimates. Finkelnburg calculated that there were 3,060,000 male offenders in the German Empire, of whom 90,000 were 12 years of age or over up to 18 years of age.

It appears from these estimates that both in England and in Germany the actual offenders constituted something over 5 per cent of the total population.

Both of the above estimates doubtless include many persons each of whom has committed but a single petty offense, and who, therefore, should not be regarded as belonging to the criminal class, according to our definition of that term.

undetected and uncaught, it may be advisable to add this estimate to the above numbers. Such an estimate would at best be very rough in its nature.

According to the U. S. Bureau of the Census, there were on January 1, 1910, in the penal institutions (state prisons and penitentiaries, county jails and workhouses, municipal jails and workhouses, institutions for juvenile delinquents, etc.) of this country 136,472 inmates. Of these 124,424 were males, and 12,048 were females. Of the total number 24,974 were juvenile delinquents. During the year 1910 there were committed to these penal institutions 493,934 persons; of whom 445,431 were males, and 48,503 were females. During the same year 468,277 persons were discharged or paroled from these institutions; of whom 422,258 were males, and 46,019 were females.[1] The ratio of commitments per 100,000 of population was 537.0; for males the ratio was 940.9, for females the ratio was 108.8.

The above statistics seem to indicate that there were about six hundred thousand persons in the penal institutions of the United States during 1910. In other words, a little more than six-tenths of 1 per cent. of the total population may have been imprisoned during that year. But these figures give no indication as to the number of recommitments during that year, so that it is impossible to estimate how many different individuals were inmates of these institutions during 1910. They also do not indicate how many persons convicted during that year were not committed to these institutions, but were fined, released on a suspended sentence or on probation, or were treated in some other way. Furthermore, they give no direct or definite indication of the distribution of the inmates of these institutions among the different classes of criminals. Consequently, the utility of these figures as indicating the aggregate number of criminals is very limited.[2] As to the number of criminals who

[1] Census Bulletin, 121, *Prisoners and Juvenile Delinquents, 1910*, Washington, 1913.

[2] Notwithstanding the extreme inadequacy of these statistics, the following estimate of the number of criminals in this country has been based upon them: "The stronghold of crime in the United States is defended by a standing army of not less than 400,000. The latest returns concerning this army are from the United States Census of 1910, but we can rest assured that in the intervening five years it has not suffered any material loss. On the first day of January of that year there were 136,000 persons in custody in prisons,

were not detected or caught during that year, I know of no data at present available which would furnish a basis for even the roughest sort of estimate of the size of this group of criminals. But I will hazard the guess that less than one-half of the professional criminals are caught during any one year.

We have seen from the statistics summarized in Chapter XI that the most careful studies of groups of criminals, which necessarily are selected, do not reveal more than from 10 to 20 per cent of aments. Consequently, probably not more than from 5 to 10 per cent of the total number of criminals are feebleminded. The same investigations do not seem to reveal more than 10 per cent who possess well marked psychoses, and who are therefore distinctly insane. However, insanity is more easily recognized than amentia, so that there are many insane persons who commit criminal acts who on account of their insanity are not prosecuted and convicted as criminals. At any rate, these investigations seem to indicate that in all probability there are not over 20 per cent and perhaps considerably less than that percentage of the total number of criminals who are sufficiently abnormal or pathological in mind to be classified either as feebleminded or as insane. There are, of course, many in addition who are suffering from minor mental deficiencies.

Inasmuch as there are very few evolutive and political criminals, practically all of the remaining 80 per cent of criminals must be divided between the professional and occasional criminals. This sub-class of criminals by passion doubtless is very small, and the sub-class of accidental criminals probably is comparatively small. So that there can be little question that the great majority of criminals belong either to the professional

reformatories, jails and workhouses. During that year there were 493,000 commitments to the same institutions, but included in these were an unknown number of recommitments of the same persons. If we allow a little more than one-third of the total number for possible recommitments (and this is a liberal allowance) and add the remaining 314,000 to the number in the institutions on the first day of the year we shall have 450,000 individuals confined in these institutions during the year. But I want to be still more conservative and from these I deduct the odd fifty thousand. Moreover I shall not consider the large number of criminals at large and not on record during the year." (J. P. Byers, *Prison Reform*, in the *Jour. Crim. Law*, Vol. VI, No. 6, March, 1916, p. 875.)

I hardly need to comment that it is well to beware of all such estimates.

class; or to the main group of occasional criminals who commit crimes only occasionally, but some of whom will eventually become professional criminals. It is impossible to determine the proportion between these two classes of criminals, but in all probability the occasional class is considerably larger than the professional class.

CHAPTER XIV

JUVENILE CRIMINALITY

Differences between childhood and adulthood — Extent and character of juvenile crimes — Poverty and juvenile criminality — Parentage and home life: broken homes; illegitimacy — Education and crime: intellectual education; moral education; vocational training; illiteracy and criminality — Recreation and crime — Immigration and crime — Effect of imprisonment upon young criminals.

THERE are two important classifications of criminals which we have not yet discussed, namely, the classifications according to age and according to sex. In the present chapter I shall recognize the distinction in age by describing the criminal traits peculiar to the young.

The criminal traits of the young are of interest and importance not only for their own sake, but also on account of the light their study throws upon the corresponding traits of adults. Many criminal careers begin in childhood or early youth. And even when a criminal career begins after maturity has been reached, the experiences and influences of early youth are frequently of great significance for explaining the later criminality. Consequently, the study of juvenile criminality is in large part a contribution to the study of adult criminality as well.

DIFFERENCES BETWEEN CHILDHOOD AND ADULTHOOD

In distinguishing between the two age groups it is possible to err either by going to the extreme of exaggerating their differences, or by going to the opposite extreme of minimizing unduly these differences. Lombroso was led into the first error because he was obsessed with a mistaken theory of atavism.[1] According to him the child represents an earlier stage in the evolution of the human species, so that in the child are to be found in a normal fashion traits, such as anger, vengeance, jealousy, lying,

[1] C. Lombroso, *L'homme criminel*, Paris, 1895, Vol. I, Part I, Chap. 3.

cruelty, laziness, vanity, lack of foresight, etc., which when manifested to the same degree of intensity by an adult are regarded as immoral and criminal. Consequently, he stigmatizes the morality of the normal child as being analogous to that of the moral imbecile and born criminal.

It is true that the recapitulation theory makes this notion seem plausible. According to this theory the individual organism in its ontogenetic development recapitulates to a certain extent the phylogenetic evolution of the species. If this recapitulation were to continue during the postnatal period of development, the child might be regarded as representing in a measure a lower type. But in all probability this recapitulation, so far as it takes place, is entirely uterine, and ends before the close of the prenatal period. Consequently, the individual has fully attained the human level at the time of birth, and the differences between children and adults do not correspond to the differences between the human type and prehuman types. Only in exceptional cases can the individual exhibit prehuman traits due to atavism or arrested development, which he will, however, carry throughout life.

It is, therefore, erroneous to assume that the child is passing through the fish or reptile or lower mammalian stages of mental and moral development. The physical, mental, and moral differences between the child and the adult are due to the fact that they are at different stages in the ontogenetic development. The child is still in the throes of this process while the adult is in the main through with it. Consequently, several traits are peculiar to childhood and early youth which may be stated briefly as follows.

In the first place, the child is subjected to the strain of growth which uses up much of his energy. In the second place, the sexual instincts and feelings are almost entirely lacking during childhood. In the third place, at the time of puberty comes a crisis due to the great changes caused by the awakening of the sexual nature, and throughout the period of adolescence, while the sexual nature is coming to full maturity, there is much instability of mind and character. In the fourth place, the child begins his life after birth in total ignorance, owing to lack of experience and education, and without any moral training, and acquires knowledge and moral character to the extent that his

congenital traits and the environment permit of such acquisition.[1]

Owing to the physical strain of growth, puberty, and adolescence, even the healthy young person may temporarily be in a somewhat abnormal and pathological state, which in some cases may lead to criminal conduct, but will later pass on to a normal and healthy adulthood. If, however, the child has inherited any congenital weakness, he is much more likely to develop abnormal and pathological traits which may remain with him throughout life. These traits of childhood and early youth, therefore, may or may not prove to be traits of adulthood as well. In other cases criminal conduct on the part of children may be due solely to ignorance and lack of suitable guidance.

We can now see clearly that, while juvenile criminality differs from adult criminality in some of its features, juvenile and adult criminality are similar with respect to many traits, probably in most respects. In fact, the juvenile criminal is frequently the prototype of the adult criminal. Consequently, most of the facts which have been presented in the preceding chapters with regard to the criminal in general apply to the young as much as to adults.

Extent and Character of Juvenile Crimes

Before going further with this study of juvenile criminality, it will be well to present some statistics concerning the extent

[1] Duprat compares the child and especially the adolescent with the adult in the following terms:

"L'enfant a moins de vigueur et d'expérience; il est plus émotif et moins passionné; l'adulte a plus de force, de persévérance, d'expérience, de puissance de réflexion et d'inhibition; l'adolescence est l'âge de la volonté encore faible, des sophismes de la passion, des croyances ardentes, des négations audacieuses, des enthousiasmes passagers et des répulsions promptes à se manifester, de l'amitié et de l'amour souvent sans lendemain, de l'émulation, de la jalousie, de la vanité, de l'oscillation entre le travail régulier et la paresse, la continence et la débauche, de *l'apprentissage* sous toutes ses formes, de la préparation décisive à la vie honnête ou à l'activité immorale. C'est le moment critique par excellence, tant au point de vue du devenir physiologique qu'au point de vue de l'évolution mentale et morale, de l'acquisition d'aptitudes à la vie sociale." (G. L. Duprat, *La criminalité dans l'adolescence*, Paris, 1909, pp. 19–20.)

and character of juvenile crimes. All of the difficulties involved in the study of criminal statistics in general exist to an even greater degree in the study of the statistics of juvenile crimes. Young children are usually not prosecuted at all for criminal acts. Older children also are frequently not prosecuted, or when prosecuted their cases are frequently disposed of in such a fashion that they are not recorded in criminal statistics. So that the statistical record of juvenile criminality is exceedingly inadequate.

The following table from the U. S. Census statistics gives some indication of the age distribution of criminals in this country:

AGE DISTRIBUTION OF OFFENDERS COMMITTED TO PRISON IN THE UNITED STATES IN 1910

		Commitments in 1910	
Age	*Population*	*Number*	*Ratio per 100,000 of population*
All ages	91,973,266	493,934	537.0
Under 10 years	20,391,996	568	2.8
10 to 14 years	9,107,140	9,061	99.5
10 years	1,868,533	710	38.0
11 years	1,705,081	1,016	59.6
12 years	1,912,061	1,764	92.3
13 years	1,773,343	2,402	135.5
14 years	1,848,122	3,169	171.5
15 to 17 years	5,372,176	15,793	294.0
15 years	1,721,225	3,778	219.5
16 years	1,864,711	4,914	263.5
17 years	1,786,240	7,101	397.5
18 to 20 years	5,546,049	35,697	643.6
18 years	1,928,366	11,033	572.1
19 years	1,763,061	12,362	701.2
20 years	1,854,622	12,302	663.2
21 to 24 years	7,202,362	64,221	891.7
25 to 34 years	15,152,188	129,974	857.8
35 to 44 years	11,657,687	99,023	849.4
45 to 54 years	8,369,988	56,230	671.8
55 to 64 years	5,054,101	22,408	443.4
65 years and over	3,949,524	7,718	195.4
Age not reported	169,055	53,241	....

This table indicates that the criminality rises rapidly until the age period of 21 to 24 years, remains high until about 45 years of age, and then falls rapidly. But it must be remembered

that this table includes only the offenders who were sent to prison, and omits those who were fined, or put on probation, or whose sentences were suspended. Consequently, it probably exaggerates adult criminality in proportion to juvenile criminality.

The following table gives some indication of the distribution of criminals in age groups in Germany: — [1]

CONVICTIONS IN GERMANY 1886–1895 PER 100,000 CIVILIANS OF THE SAME AGE AND SEX

(For crimes and offenses against national laws except evasion of military service)

Male convicts	1847.03	Female convicts	380.42
12 to 18 years	1032.72	12 to 18 years	229.56
18 " 21 "	3291.04	18 " 21 "	443.59
21 " 25 "	*3327.28*	21 " 25 "	443.58
25 " 30 "	2928.12	25 " 30 "	482.41
30 " 40 "	2259.13	30 " 40 "	*522.65*
40 " 50 "	1651.22	40 " 50 "	489.40
50 " 60 "	1068.39	50 " 60 "	314.74
60 " 70 "	571.75	60 " 70 "	153.03
70 years and over	227.25	70 years and over	58.25

According to the above table criminality among the males increases rapidly and is at its highest point relatively in the age group from 21 to 25 years of age. It falls off rapidly after the age of 25. Among the females the criminality is at its highest point relatively in the age group from 30 to 40 years of age. It does not increase as rapidly as male criminality, and decreases more slowly. Female criminality is shifted along further on the age scale than male criminality. This table is of great significance because it seems to indicate that the highest criminality is reached just after adulthood is attained.

Criminal statistics reveal some of the peculiarities of juvenile crimes, which will in turn aid us in depicting the traits of juvenile criminals. I shall, therefore, cite some tables which classify the crimes committed by juvenile criminals and indicate their relative frequency.

[1] *Statistik des Deutschen Reichs*, Neue Folge, LXXXIII, II, pp. 26 and 27.

DISTRIBUTION OF COMMITMENTS TO PRISON ACCORDING TO AGE AND OFFENSE IN THE UNITED STATES IN 1910 [1]

Selected offense	Total (excluding age not reported)	Per cent of total: Under 18 yrs.	18–24 yrs.	25–34 yrs.	35–44 yrs.	45–54 yrs.	55–64 yrs.	65 yrs. and over
All offenses	440,693	5.8	22.7	29.5	22.5	12.8	5.1	1.8
Adultery	1,066	2.1	27.8	39.9	23.2	5.1	1.9	0.2
Assault	20,623	3.5	31.6	36.2	17.9	7.7	2.4	0.7
Burglary	8,673	18.0	42.5	24.3	10.1	3.8	0.9	0.3
Carrying concealed weapons	369	3.6	39.8	36.0	14.6	4.6	1.1	0.3
Contempt	849	1.3	19.1	30.7	26.7	16.7	4.1	1.3
Delinquency	2,053	95.1	4.8	0.1	*	....	...	...
Disorderly conduct	85,527	3.5	26.5	31.6	21.8	11.1	4.1	1.5
Drunkenness	148,300	0.3	9.8	28.1	30.8	20.0	8.2	2.8
Embezzlement	923	4.3	25.6	36.7	21.5	8.5	2.6	0.9
Forgery	2,091	6.7	35.9	32.7	14.8	7.4	1.9	0.7
Fornication	3,017	14.3	30.5	31.4	15.4	6.3	1.8	0.3
Fraud	8,225	6.2	44.9	28.6	12.4	5.3	2.0	0.6
Gambling	5,471	4.7	40.9	36.8	13.1	3.4	0.9	0.2
Homicide (grave)	942	3.0	31.2	36.4	18.9	7.1	2.7	0.7
Homicide (lesser)	1,887	5.0	32.0	35.5	16.4	7.3	3.1	0.8
Incorrigibility	3,068	95.4	4.5	*	....	*	...	...
Injuries to common carriers	1,140	11.8	44.3	25.5	13.2	3.8	1.4	...
Keeping house of ill fame	971	1.0	18.4	37.9	26.7	11.1	4.0	0.8
Larceny	39,569	15.2	34.8	27.5	13.7	6.0	2.1	0.6
Malicious mischief	1,609	12.4	31.3	27.2	17.7	7.3	3.0	1.0
Non-support	2,727	0.3	13.9	36.0	32.5	13.9	3.3	0.2
Obscenity	1,777	3.6	22.9	32.4	22.1	12.3	5.5	1.4
Profanity	1,122	5.4	29.4	31.4	20.3	8.4	4.0	1.1
Prostitution	2,812	4.7	40.7	36.0	14.8	3.4	0.4	....
Rape	1,438	9.5	32.0	26.4	16.8	8.3	5.1	1.9
Robbery	1,677	8.1	45.8	33.5	10.3	2.0	0.4	0.1
Trespassing	7,263	8.6	44.8	28.4	11.7	4.7	1.5	0.3
Truancy	1,555	99.8	0.2	....	....	....	...	...
Vagrancy	45,112	3.8	23.4	29.1	21.2	13.2	6.7	2.8
Violating city ordinances	4,724	4.3	27.8	30.8	20.8	10.5	4.4	1.5
Violating liquor laws	6,396	0.7	17.4	34.8	25.4	14.1	5.4	2.2

* Less than one-tenth of 1 per cent.

AGE DISTRIBUTION OF CONVICTIONS FOR VARIOUS CRIMES IN GERMANY [2]

Convicted in 1901 of	Per 100,000 Civilians from: 12 to 14 Years	14 to 18 Years	18 Years and Over
All crimes and offenses	405.2	919.1	1361.7
Petit larceny	230.4	329.4	208.4
Grand larceny	47.8	65.0	28.2
Receiving stolen goods	14.7	19.7	19.7
Fraud	9.7	41.3	70.6
Simple assault and battery	3.7	25.1	79.1
Aggravated assault and battery	24.9	167.2	274.5
Malicious mischief	30.2	57.2	48.3
Insult	2.6	29.2	165.5
Indecent assault on children, etc	3.5	21.2	12.6
Arson	2.1	2.6	0.9

[1] *U. S. Census Statistics.*

[2] *Statistik des Deutschen Reichs*, Neue Folge, CXLVI, II, p. 50.

ITALY, 1891–1895 [1]

Crimes	*To 100,000 of Each Age Group*		
	9 to 14	*14 to 18*	*18 to 21*
Simple theft	59.50	278.89	302.86
Minor assaults	14.64	83.40	215.04
Aggravated theft	30.95	128.96	157.28
Rebellion	1.25	24.94	83.58
Serious assaults	5.22	28.56	82.07
Threats	1.11	15.10	47.71
Obtaining money under false pretenses, etc.	1.54	13.96	30.00
Homicide	0.49	3.97	15.78
Rape	1.02	6.36	9.62
Extortion, blackmail	0.41	3.55	9.07
Offenses against chastity of minors and against public decency	0.38	2.93	5.70
Offenses against public order	1.01	2.14	4.95
Assassination	0.07	0.75	3.55
Infanticide	0.01	0.02	0.36

ENGLAND, 1893–1899 [2]

Crimes	*Number of Persons under 21 to the 100 Convictions*
Simple theft	44 95
Theft by domestics	41.80
House-breaking	38.91
Theft upon the person	28.93
Malicious mischief	24.80
Extortion	23.92
Crimes against morals	23.32
Crimes committed with violence	23.23
Forgery	14.93
Obtaining money by false pretenses	13.46
Counterfeiting	13.53
Assaults	13.21

AUSTRIA, 1882–1889 [3]

Crimes	*Persons from 14 to 20 Years of Age to the 100 Convicted*
Rape, etc	32.2
Aggravated theft	25.0
Extortion	24.2
Counterfeiting	17.6
Infanticide	17.4
Assassination	14.5

[1] *Notizie complementari alle statistiche giudiziarie penali degli anni 1890–1895*, p. xlvii.

[2] *Judicial Statistics, England and Wales*, Part I, Criminal Statistics, 1899, p. 65.

[3] Cited in W. Bonger, *Criminality and Economic Conditions*, Boston, 1916, p. 413.

AUSTRIA, 1882–1889 — Continued

Crimes	*Persons from 14 to 20 Years of Age to the 100 Convicted*
Serious assaults	14.3
Defamation	13.0
Homicide	12.6
Fraud	10.9
Lese-majesté	7.0

The above tables give further evidence of the astonishing precocity of criminals. The German statistics indicate that the relative number of criminals from 14 to 18 years of age is more than two-thirds as great as the relative number of those who are 18 years and over. It must be remembered, however, that the latter group includes all of the middle-aged and aged population whose criminality is very low. According to the Italian statistics for certain kinds of offenses the relative criminality in the age group from 14 to 18 years of age is about five times as great as in the age group from 9 to 14 years, while the relative criminality in the age group from 18 to 21 years of age is nearly twice as great as in the age group from 14 to 18 years. According to the English statistics from a fourth to nearly one-half of the convictions for several important kinds of crime are of persons under 21 years of age. According to the Austrian statistics from a fourth to about one-third of the convictions for several crimes are of persons from 14 to 20 years of age.

Certain crimes stand out prominently in these statistics of youthful criminality. Among these are petit larceny, grand larceny, burglary, and various other kinds of thieving; receiving stolen goods; malicious mischief, etc. Most of these are crimes which children and adolescents are frequently tempted to commit, and they have not as much power, on the average, to resist this temptation as adults. On the other hand, on account of their ignorance and lack of opportunity they are not so likely to commit crimes requiring knowledge and skill, such as forgery, fraud, etc.

It may appear singular that sexual crimes attain so great a prominence among the adolescents and older youths. But this is doubtless due to the fact that they have not yet acquired much control over the newly awakened sexual impulses, and also to the fact that they have not as many opportunities for the gratification of these impulses as adults have in marriage

and otherwise. Furthermore, it goes without saying with respect to these crimes as with respect to all kinds of crime that the young have not as much knowledge and experience as adults to aid them in avoiding detection. In criminal statistics, however, this may be more than compensated for by the fact already mentioned that compassion for youth frequently leads to failure to prosecute youthful criminals. It must also be remembered that the young have not been subjected as much as the adults to a biological selective process which will weed out many of the aments, dements, and insane, and to a social selective process which will incarcerate many of the more dangerous permanently or for long periods of time in asylums and penal institutions.

The above facts indicate that we need no new classification for the types of young criminals. The classification which I have formulated in the preceding chapter will serve the purpose, with certain qualifications. The criminal ament is found among the young as among adults, though in a good many cases the amentia does not make itself apparent until later than childhood. The psychopathic criminal is found among the young, but probably not so frequently as among adults, inasmuch as many forms of insanity do not develop until later in life. The percentage of professional criminals is, of course, low among the very young criminals, who have not yet had enough time and experience to become professionals. But the percentage of occasionals is high, many of whom are on their way to become professionals.

There are many accidental criminals among the young, but not many criminals by passion, since most of the serious acts of passion which constitute crimes are committed later in life when the powerful emotions of anger, jealousy, envy, etc., have attained their full scope and receive greater stimuli to arouse them. Evolutive and political criminals are, of course, non-existent among children, and are comparatively rare among adolescents, but a considerable proportion of this group of criminals is to be found in early adulthood.

In Germany for all crimes and offenses against national laws there were convicted per 100,000 minors of the civil population 568 minors in 1882 and 764 in 1906.[1] According to Aschaffen-

[1] *Statistik des Deutschen Reichs,* Neue Folge, CXLVI, I, 104.

burg there were convicted per 100,000 of population 1,097 adults and 564 minors between the years 1882 and 1886, and 1,321 adults and 736 minors between the years 1902 and 1906.[1] The increase, therefore, among adults was 20.4 per cent and among minors was 30.5 per cent.[2] In Austria the number of young persons from 11 to 20 years of age convicted of crimes (exclusive of the "contraventions" or less serious offenses) increased from 1881 to 1899 from 5,865 to 7,680, or from 17.5 out of every 1,000 convicted to 22.8 out of every 1,000 convicted.[3] In Belgium the percentage of accused persons under 21 years of age increased from 14.1 in 1861 to 20.8 in 1885.[4] In Italy the number of persons from 9 to 21 years of age who were convicted increased from 30,108 in 1890 to 39,109 in 1895, or from 22.96 per cent of the total number convicted in 1890 to 23.28 per cent in 1895.[5] This was an increase of about 30 per cent in 6 years which was much greater than the percentage of increase of the total population. But the period of years covered is too brief to be of great significance.

As to the extent of juvenile crime in France [6] and in England,[7] there is great uncertainty whether the available statistics indicate an increase or a decrease in these countries. There is still greater uncertainty as to the extent of juvenile crime in this country.[8]

[1] G. Aschaffenburg, *Crime and Its Repression*, Boston, 1913, p. 148. He does not state whether these figures are per 100,000 of total population or of adults and of minors.

[2] See W. Bonger, *op. cit.*, pp. 409–410. Bonger asserts that since 1906, juvenile criminality has decreased in Germany, and intimates that the decrease is due to the "Fürsorgeerziehung" legislation.

[3] W. Bonger, *op. cit.*, p. 412.

[4] W. Bonger, *op. cit.*, p. 413.

[5] *Notizie complementari alle statistiche giudiziarie penali degli anni 1890–1895*, p. xli.

[6] See, for example, G. L. Duprat, *op. cit.*, pp. 41–47; W. Bonger, *op. cit.*, pp. 414–416.

[7] See, for example, W. D. Morrison, *Juvenile Offenders*, New York, 1897; W. Bonger, *op. cit.*, p. 411.

[8] *Prisoners and Juvenile Delinquents, 1910*, Washington, 1913, Census Bul. 121. According to this bulletin there were in the institutions for juvenile delinquents in this country on the first of January, 1910, 24,974 inmates, of whom 19,062 were males and 5,912 were females. During the year 1910 there were committed to these institutions 14,147 persons, of whom 11,971 were males and 2,176 were females. But these figures give

There is a widespread belief, which has been expressed by many writers on this subject, that juvenile crime has been increasing rapidly during the last few decades in most civilized countries, more rapidly even than crime in general. The above figures suggest that this opinion may be correct, though they do not furnish conclusive evidence of its correctness.

It should also be noted that since the beginning of the world war in 1914 juvenile crime has probably increased considerably.[1] This is to be expected in every belligerent country for several reasons. Inasmuch as many fathers and big brothers have gone to war, the boys lack control. The increased demand for labor enables them to earn money readily, and they are likely to get into trouble while spending it. Furthermore, the police suppression of crime may become somewhat weakened during war time.

Poverty and Juvenile Criminality

We shall now survey briefly the causes of juvenile criminality, especially the environmental factors. These factors have been described in earlier chapters with respect to criminality in general, and practically all that has been said applies to the young as well as to adults. The economic factors are perhaps the most powerful, and it is easy to discern the effect of these factors upon juvenile criminality.

Poverty frequently means that the child does not get enough food, or does not get the right kinds of food. This may lead to a stunting of the physical development, and is sure to weaken the resistance against disease and to strengthen predispositions to various physical and mental abnormalities. Poverty usually means a lack of adequate facilities for mental education, and may also mean a comparatively small amount of moral training.

Poverty usually leads to, or, to say the least, is accompanied by, a congestion of population in large cities. This means that the homes of the poor are crowded to such a degree as to be physically unhealthful, and mentally and morally degrading.

very slight indication of the total number of juvenile criminals in this country. It is impossible to compare these figures directly with those in the special report for the year 1904, because the classification was changed.

[1] Reports to this effect have come from England and Germany. (See the *London Times*, November 8, 1916; *New York Times*, July 7, 1917.)

On account of the congestion, also, there is lack of space and of other facilities for recreation, so that the children of the poor are forced out upon the street to play. Thus they have unusual opportunities to observe crime and are in danger of acquiring habits of drinking, gambling, and other forms of vice. In some cases they fall under the influence of criminals who need the assistance of young accomplices, and who wish to train them to be professional criminals who will work under their direction. So that the children of the poor are placed under greater pressure, on the whole, to become criminals, prostitutes, gamblers, drunkards, etc., than are the children of the rich.

Among the poor both parents are frequently forced to work in order to earn enough to support the family. In such families the children are left without parental care, and frequently without any other kind of care for much of the time. Without adequate restraint and guidance these children are likely to run wild, and very soon to get into mischief.

Furthermore, the children of the poor frequently are forced to go to work very young in order to help support the family. Since the industrial revolution of the eighteenth and nineteenth centuries there has been an enormous amount of child labor which has not yet been prevented by legislation.[1] It is difficult to secure statistical evidence of the influence of this child labor upon crime.[2] But the consensus of opinion among the students of the subject seems to be that child labor is a prolific cause of crime. This is not, of course, because labor in itself causes criminal conduct. But labor for young children is very likely to stunt their growth and do them other physical injury. It is almost certain to interfere with their education, and thus to impede their mental development. In some occupations it is very likely to bring them under immoral and sometimes criminal influences, as, for example, in the work of newsboys, peddlers, bootblacks, messengers, etc.[3]

[1] I have summarized the statistics of child labor in the United States in my *Poverty and Social Progress*, New York, 1916, pp. 138–139.

[2] For numerous statistics on this subject see the *Report on Condition of Woman and Child Wage-Earners in the U. S.*, Vol. VIII, "Juvenile Delinquency and Its Relation to Employment," Washington, 1911. (Senate document 645, 61st Cong., 2d Sess.) See also Vol. VII of this report on "Conditions under which Children Leave School to Go to Work," Washington, 1910.

[3] "The paid labor of the young has a bad influence in several ways. First,

Parentage and Home Life

Many of the immediate causes of juvenile criminality can be found in the parentage and home life of the children and adolescents.[1] Most of these causes can in turn be traced back to the economic and other factors which we have described. Many parents, especially among the poor, are ignorant, and are therefore incapable of giving their offspring wise guidance and training during their youth. Their children are likely to go astray on account of the ignorance of their parents. A smaller number of parents are immoral and vicious. These parents furnish a bad example for their children, and in a few cases deliberately teach their children to be vicious and criminal. Some avaricious parents force their children to work even when there is no need for their earnings. As has already been noted, when both parents are forced to work, the children lose many of the benefits of parental care. When the children themselves are forced to work, they lose many of the benefits of home life.

Many families are broken up in part or entirely by widowhood, desertion, divorce, etc.[2] Divorce probably does not have much effect upon crime, because the economic well-being of the children is not injured usually by the divorce. While these children lose the benefits of bi-parental rearing, they are frequently benefited by no longer being forced to witness the infelicities arising out of the ill-mated unions of their parents.

But widowhood and desertion are very likely to lead to criminality on the part of the children in the families thus affected. This is not so likely to happen where the male parent is widowed

it forces them, while they are still very young, to think only of their own interests; then, brought into contact with persons who are rough and indifferent to their well-being, they follow these only too quickly, because of their imitative tendencies, in their bad habits, grossness of speech, etc. Finally, the paid labor of the young makes them more or less independent at an age where they have the greatest need of guidance." (W. Bonger, *op. cit.*, p. 407.)

[1] For graphic descriptions of these domestic causes of juvenile criminality, see, Sophonisba P. Breckinridge and Edith Abbott, *The Delinquent Child and the Home*, New York, 1912; L. Albanel, *Le crime dans la famille*, Paris, 1900. See also certain chapters in C. E. B. Russell and L. M. Rigby, *The Making of the Criminal*, London, 1906; G. L. Duprat, *op. cit.*

[2] For statistics on this subject see my *Poverty and Social Progress*, Chap. XV, entitled "Domestic and Matrimonial Maladjustment."

or deserted, because ordinarily he is able to continue supporting his children, who lose only the maternal care. But when the female parent is widowed or deserted, her position is usually much more precarious. Frequently she is forced to go out to work, thus leaving her children without parental care. But even then she is usually not able to support herself and her children fully, so that the family becomes dependent at least in part, and may be broken up entirely.

The most complete breaking up of the family and of the home life comes when both parents are lost and the children are left orphans. Then if they are not taken into the private homes of relatives or others, or into institutions, they are in great danger of embarking upon careers of vagrancy, prostitution, and crime.

Another factor in juvenile criminality which should be mentioned in this connection is illegitimacy. It has long been noted that there is a disproportionately high number of persons of illegitimate birth in prisons and reformatories and among prostitutes.[1] This is probably due in part to the fact that mentally defective persons, and especially feebleminded girls and women, are much more likely to have illegitimate children than the mentally normal. Consequently, there is a much higher percentage of mental defectiveness among the illegitimate than among the general population. But it is also due to the facts that a bastard almost invariably has the care of only the maternal parent, and frequently not even her care; is brought up in dire poverty; and lives under a grave social disability which greatly hampers him in his career.

Education and Crime

It goes without saying that one of the most important factors in the rearing of a child is his education. This is to be acquired partly in the home; but more particularly in the school, which is the special agency of education. The purpose of education is to prepare the child for his life and career. The first requisite in any efficient system of education is that the child be taught the nature of the world in which he lives, in order that he may be

[1] For statistics on this subject, see my *Poverty and Social Progress*, pp. 210–213; and G. Aschaffenburg, *op. cit.*, pp. 129–131.

able to orient himself therein. This means that he must be given at least a minimum amount of information from the sciences of physics, chemistry, astronomy, and geology to enable him to understand the nature of the physical environment in which he lives, and the natural laws which govern therein. He must be taught enough biology and psychology to grasp the significance of the evolutionary process, and to understand in a measure his own nature and that of his fellows. He must be taught something of social evolution, and given a fairly clear understanding of social organization, in order that he may comprehend the nature of the society in which he lives. If the system of education is given a sound scientific foundation, the individual is not likely to be misled by animistic explanations of natural phenomena, or to be induced to use magical and other superstitious methods with the purpose of influencing natural processes.

An education of this nature is intellectual in its character, and it may be thought by some that it can have no moral influence. But it is easy to show that this education has also the highest moral value. I have already had occasion to state several times that immorality, viciousness, and criminality frequently are due to failure on the part of the individual to adjust himself to his surroundings, and this failure is frequently due to ignorance as to the nature of these surroundings. With an education such as is outlined above this ignorance would not exist, except in the cases of those who are too feebleminded to acquire it, and this important cause of moral maladjustment would disappear. It may not be apparent at first sight how this would result from the study of the inorganic sciences. But it is evident that it would be a direct result of the study of the psychological and social sciences. These sciences furnish an insight into human nature and the nature of society, and thus reveal the nature of and the justification for moral ideas and laws, in other words, the means of social control. Furthermore, the study of these sciences, because of their subject-matter, arouses sympathetic emotions which are not aroused to the same extent by the inorganic sciences, and thus an additional dynamic force is given to the effects from their study.

Indeed, when all things are taken into consideration, it becomes evident that so-called "moral" education must be in the

main intellectual in its character.[1] Inasmuch as civilization has reached the scientific stage in its progress, moral ideas can no longer be based upon metaphysical speculations or theological dogmas, but only upon inductive knowledge. In the present age genuine morality can arise only upon the basis of a comprehension of natural phenomena such as can be acquired only through the educational system outlined above, and physical living conditions which permit of the development of personality and of a fair degree of freedom of choice and initiative.

In addition to the general education outlined above is needed training for life work, namely, vocational education. Under present conditions the great majority of young persons drift more or less aimlessly into occupations for which they have not been specially trained, and for which they are not necessarily well fitted. Thus the chances of failure are greatly increased, and many of them eventually become unemployed, and some of them become vagrants and are in great danger of becoming criminals. I have already shown how important a factor in the causation of criminality is lack of economic success. Con-

[1] De Lanessan expresses the opinion that intellectual training has much greater moral efficacy than so-called "moral" training, among other reasons because it develops in the child the love for work which is in itself a powerful safeguard against immorality, viciousness, and criminality:

"Les enfants auxquels les professeurs ou les instituteurs parviennent à inculquer le goût du travail échapperont presque tous aux dangers de contagion auxquels ils sont exposés. Ils y échapperont presque à coup sûr, si leur famille leur a déjà inculqué ce goût pendant le premier âge. Aussi, les éducateurs doivent-ils se donner pour but, non d'apprendre beaucoup de choses à leurs élèves, mais de leur inspirer l'amour de la science, afin qu'ils en arrivent à aimer le travail. Et c'est pourquoi je préconise les sciences d'observation et d'expérience comme base fondamentale de l'enseignement primaire, aussi bien que de l'enseignement secondaire ou supérieur. Par elles, l'enfant acquiert sans peine le goût du travail, parce qu'il est essentiellement curieux et qu'il est poussé par le besoin d'activité, dès le premier âge, à exercer tous ses sens." (J. L. de Lanessan, *La lutte contre le crime*, Paris, 1910, p. 100.)

"S'il m'était possible de condenser en quelque brève formule ces considérations, je dirais volontiers que le plus sûr moyen de faire des honnêtes gens, c'est d'inspirer aux enfants, dès leur premier âge, l'amour du travail. L'homme le plus laborieux pourra, il est vrai, en raison de son égoïsme naturel et des passions qui en naissent et sous l'influence de quelque excitation extérieure, devenir un criminel d'occasion, mais il ne deviendra jamais, quelle que soit son hérédité physiologique, un professionel du crime." (*Op. cit.*, p. 101.)

sequently, there should be adequate facilities for vocational training for every youthful person in society. But in addition to this system of vocational training there must be a place in the economic system for every new worker, for no amount of such training can be of any value if the student cannot use it ultimately in productive labor. So that with the improvement of the educational system should come a reorganization of the economic system which will eliminate unemployment, and will make possible the utilization of all of the available labor supply of society.

If we consider the existing educational facilities, it is obvious how inadequate and ineffective these facilities are. We have already noted the defects and inadequacies of the homes of the poor as educational forces. But the homes of the middle and upper classes frequently are little better. In how many of these homes are the children trained to take their places in the larger society to which they are eventually to belong? On the contrary, on account of the narrow outlook of the majority of their parents, especially of the mothers, these homes are all too frequently schools of malicious gossip, scandalmongering, backbiting, and other petty vices which in their aggregate cause an enormous amount of unhappiness and social maladjustment, and sometimes lead to criminal conduct. The only kind of preparation for the larger social life which is given in many of these homes is the conventional training in formal courtesy, which consists largely of puerile and banal rules with regard to non-essentials which aid little or not at all in promoting social harmony.[1]

[1] See, for example, Edith B. Ordway, *The Etiquette of To-Day*, New York, 1913. This recent treatise on etiquette contains a few true but trite aphorisms which belong to genuine courtesy, but consists mainly of the puerilities and banalities of formal courtesy. From the numerous examples of the latter I have gleaned a few of the instructions issued by this writer to her naïve and ingenuous readers.

For etiquette at the table the reader is informed that "it is not permissible to eat peas with a spoon," and that "lettuce, cress, and chicory are never cut with a knife, but rolled up on the fork and so conveyed to the mouth." For behavior in public the readers, male and female, are instructed as follows: "Upon the street a gentleman always takes the outside of the walk, when with a lady, the custom having come down from the days when dangers beset the path, and the man had to be at the point of vantage for the protection of the woman. When a married woman and an unmarried girl are walking together, the married woman takes the outside of the walk."

The training in genuine courtesy which is essential as a preparation for kindly and harmonious social relations is in the main lacking.

Little can be done by means of direct measures to raise the moral tone of the vast majority of homes. This can come only indirectly through an improvement in the economic conditions of the great mass of the people, and by rendering the educational system more efficient. But much can be done directly to improve the schools, because most of the schools in civilized countries are now under the direction of the state, and an enlightened government can raise very rapidly the intellectual and moral standards in these schools.

It is a well-known fact that at present most schools are very inefficient, many of them being almost as ineffective as the homes. These schools are inefficient because they fail to teach their pupils the nature of the world in which they live, because they do not train them for their careers, because they do not develop in them a love for suitable labor, and because they fail to interest them in their studies. These failures are due to the nature of many of the subjects taught, to the character of the pedagogical methods used, to the lack of vocational training, and to the general ignorance and lack of training of most of the teachers.

In such schools as now exist it is impossible to put into effect the educational system which is outlined above, so that young persons are being sent out into the world with a preparation much below what they might receive in a better school system. Furthermore, on account of lack of interest in their studies many pupils become truants before they leave school, and some of these become vagrants and eventually graduate into a life of crime.

I have already pointed out the high moral value of the intellectual education to be received in the schools. But the school life and discipline has great moral value in other respects as well. In fact, in some respects the moral training received in the school is superior to that received in the home. In the home

With respect to "the art of being a guest" the following solemn injunction is laid upon the reader: "A formal dinner is one of the most solemn obligations of society. After having once accepted the invitation, only death or mortal illness is an excuse for not attending."

the deep but narrow filial and fraternal emotions are aroused. But in the school life much broader but not so profound social emotions are aroused, which are in some ways of greater value for the later life of the child in society at large. In the school the child is brought into touch with a greater number of and more conflicting interests than in the home, and is usually forced to adopt a more social point of view than in the home, where a socially selfish attitude is likely to be encouraged. There is doubtless many a child who is morally successful in his home life, but who would be a moral failure in his life in society if he did not receive the school training and discipline.[1]

It is impossible to measure directly the influence of faulty education upon criminality. Numerous statistics have been secured which indicate that the percentage of illiteracy among criminals is much higher than it is among the general population.[2] This seems to indicate a causal relation between ignorance and criminality. Some may account for this association between ignorance and criminality by the fact that poverty causes much of the crime, and that the poor are likely to be ignorant because they lack opportunities to be educated. But the truth probably is that ignorance gives rise to crime both directly and also through the poverty which it causes.

It has been contended by a few writers that ignorance is not a cause of crime, because crime has apparently increased in recent years even though illiteracy has decreased.[3] But in Chapter VIII I have already pointed out that it seems to be inevitable that the social readjustment required for the progress

[1] Aschaffenburg expresses the opinion that the school furnishes more moral training then the home: —

"As far as the development of altruistic modes of thought are concerned, I am inclined to attach still greater importance to the school than to the family. The school must not and cannot take the place of the home, but, within the close circle of family life, training and education are, after all, only possible to a limited extent, because encroachments on others' spheres of interest can be but slight in nature. Companionship with others of the same age in school, however, entails innumerable conflicts which arouse in the child the indistinct desire to have his interests protected against others, and also awaken in him an understanding of the necessity of adapting himself to others, to his surroundings, we might say, to the State on a small scale." (G. Aschaffenburg, *op. cit.*, pp. 139–140.)

[2] See, for example, W. Bonger, *op. cit.*, pp. 425–434, 483.

[3] See, for example, R. Garofalo, *Criminology*, Boston, 1914, pp. 137–140.

of civilization should cause some increase of crime. Furthermore, it must be borne in mind that the percentage of illiteracy among the criminals still remains high, even though the general average of education is rising.[1]

It has also been contended by some writers that education aids criminals in their illegal activities. It goes without saying that there are certain kinds of crime, such as forgery, embezzlement, fraud, etc., which require a good deal of knowledge and intelligence. But these crimes are probably more than counterbalanced by the crimes, which, owing to the ignorance of their perpetrators, are so stupid as to be foolish even from the point of view of the criminals themselves. And in any case, it would be the most egregious folly to argue in favor of keeping the populace uneducated and ignorant in order to keep from a number of professional criminals the knowledge which would enable them to commit some of the higher types of crimes.

Recreation and Crime

Lack of adequate and suitable recreational facilities has caused much juvenile criminality. This has been especially true in the city. Many a city child has had only the street in which to play. Here he has been exposed to many immoral and vicious suggestions and temptations. Many first violations of the law have taken place when playing in the street. Sometimes the violation was no more than an attempt to satisfy the natural and healthful impulse to play by playing baseball or some other game forbidden by the law. Sometimes it was breaking a window, or petty theft from a peddler or from a store window. Frequently these offenses are no more than

[1] Lombroso sums up his explanation of how education is a force both for and against crime in the following words:

"All this explains a phenomenon which appears at first completely self-contradictory, namely, that education now increases crime and now decreases it. When education is not yet diffused in a country and has not yet reached its full development, it at first increases all crimes except homicide. But when it is widely disseminated it diminishes all the violent crimes, except, as we shall see, the less serious crimes, the political crimes, or the commercial or sexual crimes, because these increase naturally with the increase of human intercourse, business, and cerebral activity. But education has an indisputable influence upon crime in changing its character and making it less savage." (C. Lombroso, *Crime, Its Causes and Remedies*, Boston, 1911, p. 111.)

childish pranks from which the child would be saved if he was not forced out upon the street to play. Street playing easily leads to truancy and vagrancy, which may in turn lead to crime.

Frequently the gregarious impulses of boys will lead them to form street gangs, at first with the most innocent of purposes. But the power of suggestion and of imitation being strong over boys, they are soon led into mischievous pranks which no boy would think of doing alone, and these pranks are very likely to lead in turn to truly vicious and criminal acts. This is especially likely to happen among the immigrant population of our large cities, because the children of the immigrants are usually more Americanized than their parents, so that the parental control over them becomes weak.

In passing, we should also note that the theater as a form of recreation has some influence upon juvenile criminality. The boy who witnesses melodramatic plays and pictures in the theatres and moving picture shows which depict crimes and acts of violence may be stimulated thereby to try to imitate these acts. This is not likely to happen to the healthy, normal boy who has plenty of opportunity for healthful and active recreation in which he can expend all of his surplus energy and can satisfy his desire for excitement and adventure. But the city boy who lacks these opportunities may be led into attempts to imitate these acts, while any boy who is somewhat abnormal physically and mentally in such a way as to be unusually suggestible is likely to make these attempts.

Immigration and Crime

An important factor in juvenile criminality in this country is immigration. The significent feature of immigration in this connection is that it leads to a conflict between the culture of the incoming immigrant and the culture of this country. Especially striking is this conflict when the immigrant is of a different language, race, and religion from the bulk of the population of this country. When this is the case, it requires some time for the immigrant to adjust his culture to that of this country. In many cases he fails in the main to do so, and consequently is not assimilated to any great extent. It is difficult to ascertain whether this failure on the part of the immigrant

leads to an increase of crime. The latest Census figures seem to indicate that such is the case. But there is much reason to believe that this failure on the part of the immigrant to become assimilated results in an increase in the criminality of his children. The experience of those who have had opportunity to observe many of the immigrant families in our large cities confirms this belief.[1]

[1] The U. S. Immigration Commission studied much of the available statistics on the relation between immigration and crime and arrived at the following conclusions: —

"No satisfactory evidence has yet been produced to show that immigration has resulted in an increase in crime disproportionate to the increase in adult population. Such comparable statistics of crime and population as it has been possible to obtain indicate that immigrants are less prone to commit crime than are native Americans.

"The statistics do indicate, however, that the American-born children of immigrants exceed the children of natives in relative amount of crime. It also appears from data bearing on the volume of crime that juvenile delinquency is more common among immigrants than it is among Americans. There are, however, two factors affecting these conclusions. First, immigrants are found in greater proportion in cities than in rural communities, and the criminality of the children of immigrants is largely a product of the city. Second, the majority of the juvenile delinquents are found in the North Atlantic States, where immigrants form a larger proportion of the population than in any other section of the country." (*Reports of the Immigration Commission*, Vol. 36, "Immigration and Crime," Sen. doc. 750, 61st Cong., 3d sess., p. 1.)

But the latest Census figures seem to disprove the first part of the conclusion of the Commission. According to these figures the number of native whites committed to prison during 1910 was 253,929, and the number of foreign-born whites committed during the same year was 99,639. The ratio of commitments per 100,000 of population of the same nativity for the native whites was 371.3, while for the foreign-born whites it was 746.6. In other words, the criminality of the foreign-born whites was twice as great as the criminality of native whites. And inasmuch as only 14,147 persons were committed to institutions for juvenile delinquents during the same year, only a part of whom were foreign-born, the vast majority of the foreign-born whites who were committed must have been adults. So that these figures seem to indicate that the adult immigrants are much more criminal than the native born.

It must be remembered that this difference is explained in part by the difference in the age composition of the two groups, the native born whites including a much larger proportion of young children incapable of committing crimes. But this difference in age composition can hardly explain away the great excess in the criminality of the foreign-born over the criminality of the native whites.

While the immigrant parent may fail to become Americanized, his children are sure to become more or less Americanized. In many cases this means that the parent will lose his influence and control over the children to a considerable extent. The result is that the children are likely to go astray, owing to lack of parental control. This is all the more likely to happen when the children, while losing the moral standards of their parents, fail to acquire in full the moral standards of this country. Thus cast adrift without adequate moral guidance and bearings, many of the first generation born of immigrant parents have fallen into careers of crime and vice.[1]

Imprisonment and Juvenile Criminality

Still another factor in the causation of juvenile criminality is the effect of incarceration in industrial and reform schools and in reformatories. Sometimes the immediate effect of such imprisonment is very bad. But even when these institutions are well administered, so that their inmates benefit on the whole from their life within them, these inmates are likely to suffer

[1] A writer who observed these phenomena in New York City has described them in the following graphic terms:

"The story of the gang begins. So trained for the responsibility of citizenship, robbed of home and of childhood, with every prop knocked from under him, all the elements that make for strength and character trodden out in the making of the boy, all the high ambition of youth caricatured by the slum and become base passions, — so equipped he comes to the business of life. As a 'kid' he hunted with the pack in the street. As a young man he trains with the gang, because it furnishes the means of gratifying his inordinate vanity, that is the slum's counterfeit for self-esteem. Upon the Jacobs of other days there was a last hold, — the father's authority. Changed conditions have loosened that also. There is a time in every young man's life when he knows more than his father. . . . It is the misfortune of the slum boy of to-day that it is really so, and that he knows it. His father is an Italian or a Jew, and cannot even speak the language to which the boy is born. He has to depend on him in much, in the new order of things. . . . That is why the gang appears in the second generation, the first born upon the soil, — a fighting gang if the Irishman is there with his ready fist, a thievish gang if it is the East Side Jew, — and disappears in the third. The second boy's father is not 'slow.' He has had experience. He was clubbed into decency in his own day, and the night stick wore off the glamor of the thing. His grip on the boy is good, and it holds." (J. A. Riis, *A Ten Years' War*, An Account of the Battle with the Slum in New York, New York, 1900, pp. 150–152.)

from difficulties of reinstatement after leaving these institutions. Even when the boy or girl has been sent to the institution more on account of the faults and failings of the parents than of himself or herself, there is usually a stigma attached to the ex-inmate of one of these institutions which makes reinstatement difficult, and the boy or girl may become confirmed in a life of crime and vice. These difficulties have been obviated in part by the juvenile court, the probation system, etc., which I shall describe later in this book, but still exist to a deplorable degree.

CHAPTER XV

FEMALE CRIMINALITY

Apparent preponderance of male over female criminality — Extent and character of female crimes — Conjugal condition of criminals — Differences between men and women: physical inferiority and sympathetic nature of woman; greater variability and katabolism of man — Lenient treatment of female criminals — Woman shielded from criminality by her secluded life — Extra-judicial female crimes — Prostitution and crime.

THE available judicial and penal statistics of crime seem to indicate that there is much less female than male criminality. This is well illustrated in the following table: — [1]

COMPARATIVE CRIMINALITY OF MEN AND WOMEN

	Of 100 Persons Convicted there were		*Number of Men to 1 Woman*
	Men	*Women*	
Italy (1885–1889)	84.1	15.9	5.2
Great Britain (1858–64)	79.0	21.0	3.8
Denmark and Norway	80.0	20.0	4.0
Holland	81.0	19.0	4.5
Belgium	82.0	18.0	4.5
France	83.0	17.0	4.8
Austria	83.0	17.0	4.8
Baden	84.0	16.0	5.8
Prussia	85.0	15.0	5.7
Russia	91.0	9.0	10.1
Buenos-Aires (1892)	96.4	3.6	27.1
Algeria (1876–80)	96.2	3.8	25.0
Victoria (1890)	91.7	8.3	11.0
New South Wales	85.5	14.5	5.8

According to this table there is from four to six times as much male criminality as there is female criminality. The much lower ratios of female criminality in Buenos-Aires and

[1] Adapted from C. Lombroso, *Crime, Its Causes and Its Remedies*, Boston, 1911, p. 181.

in Victoria may be due to a disproportionately small number of women in the population and to other conditions characteristic of new countries, and in Algeria to a backward civilization which furnishes women few opportunities for committing crimes.

Extent and Character of Female Crimes

Statistics of female criminality in this country are very inadequate. According to the U. S. Bureau of the Census, there were on January 1, 1910, in the penal institutions (state prisons and penitentiaries, county jails and workhouses, municipal jails and workhouses, institutions for juvenile delinquents, etc.) of this country 136,472 inmates. Of these 124,424 were males, and 12,048 were females. During the year 1910 there were committed to these penal institutions 493,934 persons; of whom 445,431 were males, and 48,503 were females. The ratio of commitments per 100,000 of population was 537.0; for males the ratio was 940.9, for females the ratio was 108.8. Consequently, the ratio for the males divided by the ratio for the females, or coefficient of difference, was 8.6.

These statistics seem to indicate that female criminality in relation to male criminality is lower in this country than in most civilized countries. But it must be remembered that these are the figures for commitments to penal institutions, and everywhere courts are more reluctant to send women to prison than to imprison men. This is probably even more true of the courts in this country than of the courts of other countries. So that the apparent deficiency of female criminality in this country can doubtless be attributed at least in part to the sentimental chivalry (whether mistaken or not we need not say here) of the American courts and public.

The following table indicates the distribution of ten of the principal offenses for which men were committed to prison in 1910 as compared with ten of the principal offenses for which women were committed to prison during the same year: — [1]

[1] *U. S. Census Statistics.*

MEN AND WOMEN COMMITTED TO PRISON IN THE UNITED STATES IN 1910

Males

Offenses	*Commitments*	
	Number	*Per Cent Distribution*
All offenses	445,368	100.0
1. Drunkenness	158,181	35.5
2. Disorderly conduct	76,140	17.1
3. Vagrancy	46,560	10.5
4. Larceny	40,246	9.0
5. Assault	21,201	4.8
6. Fraud	8,858	2.0
7. Burglary	8,847	2.0
8. Trespassing	8,327	1.9
9. Violating liquor laws	7,219	1.6
10. Gambling	6,834	1.5
All other offenses	62,955	14.1

Females

Offenses	*Commitments*	
	Number	*Per Cent Distribution*
All offenses	48,566	100.0
1. Disorderly conduct	15,788	32.5
2. Drunkenness	12,796	26.3
3. Vagrancy	3,742	7.7
4. Prostitution	3,155	6.5
5. Larceny	2,470	5.1
6. Assault	1,469	3.0
7. Fornication	1,231	2.5
8. Incorrigibility	787	1.6
9. Keeping house of ill fame	692	1.4
10. Violating city ordinances	656	1.4
All other offenses	5,780	11.9

The following tables indicate the comparative criminality of men and women in several other countries with respect to certain kinds of crime and crimes in general.

GERMANY, 1896 [1]

Crimes	Number of Persons Convicted to 100,000 of Same Sex		Number of Women Convicted to Each 100 Men Convicted
	Men	Women	
Abandonment of children	0.02	0.1	800.0
Abortion	0.4	1.7	437.3
Procuration	6.0	9.2	167.7
Receiving stolen goods (repeated recidivism)	0.07	0.1	158.3
Receiving stolen goods (simple recidivism)	26.5	13.1	53.9
Simple theft	274.6	100.8	40.1
Perjury	3.1	1.2	38.7
Insults	223.7	76.5	34.2
Simple theft (repeated recidivism)	51.7	14.4	30.5
Homicide	0.5	0.1	22.0
Arson	2.2	0.5	21.8
Embezzlement	85.6	17.6	20.6
Fraud	101.7	20.4	20.1
Crimes in general	*2177.07*	*388.9*	*17.9*
Extortion	3.0	0.4	14.3
Aggravated theft	45.0	5.6	13.5
Domiciliary trespass	103.8	12.3	11.8
Minor assaults	138.3	15.4	11.1
Aggravated theft (repeated recidivism)	14.4	1.2	9.1
Serious assaults	448.4	32.8	7.3
Violence, etc., against officials	88.3	5.6	6.3
Violence and threats	60.7	3.6	5.9
Malicious mischief	93.6	5.4	5.8
Robbery	2.4	0.07	2.9
Crimes against morals upon children	25.3	0.2	0.7

ENGLAND AND WALES, 1893–1894 [2]

Crimes	Number of Women to 100 Persons Sentenced	
	1893	1894
Abortion and failure to report birth	91	86
Kidnapping and cruelty to children	70	57
Counterfeiting, etc	18	21
Malicious mischief	15	20
Crimes against property without violence	19	19

[1] *Statistik des Deutschen Reichs*, Neue Folge, Kriminalstatistik für das Jahr, 1896, Erläuterungen, II, p. 33.

[2] England and Wales, *Judicial Statistics*, Criminal Statistics, 1894, p. 19.

Other crimes	16	16
Crimes of violence against persons	11	13
Robbery and extortion	10	11
Forgery	9	8
Domiciliary trespass, etc.	3	4
Sexual crimes	4	3

AUSTRIA, 1899 [1]

Crimes	*Of 100 Convicted of Each Crime there were*	
	Men	*Women*
Abandonment of children	7.1	93.8
Abortion	10.7	89.2
Murder	69.6	30.3
Fraud	79.1	20.8
Theft	80.4	19.5
Defamation	80.9	19.0
Arson	85.2	14.7
Crimes in general	*86.1*	*13.9*
Rebellion	89.5	10.4
Lese-majesté	91.6	8.3
Criminal breach of trust	93.4	6.5
Crime against religion	94.8	5.1
Robbery	95.1	4.8
Serious assaults	95.8	4.1
Sexual crime	96.7	3.2
Malicious mischief	96.8	3.1
Homicide	97.3	2.6
Blackmail	97.4	2.5

ITALY, 1891–1895 [2]

Offenses	*To 100 Sentenced for Each Offense there were*	
	Men	*Women*
Infanticide	7.70	92.30
Procuration	19.11	80.89
Abortion	21.65	73.35
Defamation	53.70	46.30
Insults	54.78	45.22
Offenses against morals and order of the family	58.27	41.73
Abandonment of children, abuse of means of correction	62.85	37.15
Simple theft	75.63	24.37
Fraud in commerce and industry	79.46	20.54

[1] *Die Ergebnisse der Strafrechtspflege in den im Reichsrate vertretenen Königreichen und Ländern im Jahre 1899 Œsterreichische Statistik*, Vienna, 1903, p. xlix.

[2] *Notizie complementari alle statistiche giudiziarie penali degli anni 1890–95*, p. xxxvii.

ITALY, 1891–1895—Continued

Offenses	*To 100 Sentenced for Each Offense there were*	
	Men	*Women*
Offenses in general	*82.81*	*17.19*
Minor assaults	83.32	16.68
Corruption of minors and offenses against decency	84.80	15.20
Fraud, etc	85.74	14.26
Aggravated theft	88.77	11.23
Threat	90.68	9.32
Rebellion and insults to public officials	90.95	9.05
Forgery	92.49	7.51
Serious assaults	93.61	6.39
Murder	93.91	6.09
Counterfeit money	95.02	4.98
Homicide	96.74	3.26
Offenses against public order	97.70	2.30
Robbery, etc	97.77	2.23
Rape, etc	99.04	0.96

The last four tables also indicate that there is from four to six times as much male criminality as there is female criminality. According to the British census of 1910, 51.5 per cent of the population of England and Wales were women; according to the Austrian census of 1890, 51.6 per cent of the Austrian population over 14 years of age were women; and according to the Italian census of 1901, 50.6 per cent of the Italian population over 9 years of age were women. So that the population of these countries was almost evenly divided between the two sexes.

These tables indicate that in abortion; certain crimes against children, such as infanticide, abandonment, kidnapping, cruelty, etc.; procuration; and in some forms of receiving stolen goods; female criminality exceeds male criminality. Abortion and her crimes against children are due to her functions in bearing and rearing children, procuration is due to her activities as a prostitute and an exploiter of prostitutes, and receiving stolen goods is due to her activities as an accomplice of criminals.

More detailed analyses of criminal statistics have revealed the fact that women commit poisoning more frequently than men, this being an easy way for them to commit murder. It is probable also that they commit such crimes as vitriol throwing more frequently than men, owing to jealousy; and make false accusations more frequently than men, owing to their hysterical

tendencies. These false accusations are usually of sexual attacks upon them by men.

The above tables also indicate that women commit very few crimes of violence, owing largely to their physical weakness. Partly for the same reason they commit few of the sexual crimes, though this may be due also in part to their more passive sexual nature. They commit few of the higher classes of crimes such as forgery, embezzlement, counterfeiting money, etc., mainly because women do not play an important part in the business and professional worlds.

Conjugal Condition of Criminals

Before attempting to explain why there is apparently so much less female than male criminality, it is desirable to present some data with respect to the conjugal condition of both male and female criminals.

Italy, 1891–1895 [1]

Status	*Annual Average Number (of Criminals) to 100,000 of the Population in Each Group over 14 years*
Unmarried	978.47
Married	622.27
Widowers and widows	291.84

The decrease in criminality from the unmarried, through the married, to the widowed should be correlated in the main with the increase in age, since I have shown in the preceding chapter that criminality is greatest during adolescence and early adulthood, and decreases steadily throughout the remainder of life.

Netherlands, 1899 [2]

Status	*Men*		*Women*	
	To 100 Men of Marriageable Age there were:	*To 100 Male Convicts of Marriageable Age there were:*	*To 100 Women of Marriageable Age there were:*	*To 100 Female Convicts of Marriageable Age there were:*
Unmarried	34.8	59.1	36.2	36.7
Married	58.8	36.7	52.4	52.6
Widowers, widows, divorced	6.4	4.2	11.4	10.7

[1] *Notizie complementari alle statistiche giudiziarie penali degli anni 1890–1895*, p. lii.

[2] W. Bonger, *Criminality and Economic Conditions*, Boston, 1916, p. 450.

SWITZERLAND, 1892–1896 [1]

Status	Men: To 100 of Male Population over 12 Yrs. Old there were:	Men: To 100 Male Prisoners there were:	Women: To 100 of Female Population over 12 Yrs. Old there were:	Women: To 100 Female Prisoners there were:
Unmarried.....	49.3	64.0	45.7	48.5
Married.....	44.8	26.6	41.9	33.0
Widowers and widows	5.5	5.7	11.7	11.6
Divorced.....	0.4	3.7	0.7	6.9

The last two tables indicate that the unmarried men are much more criminal than the married men, but that the criminality of the unmarried women is very slightly above that of the married women. The following table indicates the distribution both with respect to age and with respect to conjugal condition, and is, therefore, much more significant than any of the preceding tables.

GERMANY, 1882–1893 [2]

Age	Convictions per 100,000 Men and Women of Each Category: Single	Married	Widowed or Divorced
Men			
12–15 years.....	661.1	.....	.....
15–18 "	1319.2	.....	.....
18–21 "	2994.5	*6413.0*	.....
21–25 "	3107.0	*3566.3*	.....
25–30 "	2950.9	2504.7	*4273.7*
30–40 "	2880.9	1961.2	*3797.3*
40–50 "	2205.7	1487.8	*2626.3*
50–60 "	1241.9	1009.8	*1267.8*
Over 60 "	*494.6*	490.1	342.7
Women			
12–15 years.....	149.5	.....	.....
15–18 "	320.5	.....	.....
18–21 "	415.2	*602.5*	.....
21–25 "	417.5	469.9	*1339.3*
25–30 "	440.7	454.5	*1149.2*
30–40 "	446.2	500.0	*1029.9*
40–50 "	334.7	468.2	*709.9*
50–60 "	221.5	299.5	*369.2*
Over 60 "	102.2	*133.4*	111.2

[1] *Die Ergebnisse der Schweizerischen Kriminalstatistik während der Jahre 1892–1896*, p.21.

[2] Adapted from G. Aschaffenburg, *Crime and Its Repression*, Boston, 1913, p. 164. This author presents these German statistics in much greater detail and interprets them in a suggestive manner.

It is evident from the above table that the young married men, namely, from 18 to 25 years of age are more criminal than the unmarried of the same age. This may be due largely to the heedless early marriages among the poor, as a result of which many young married men are driven into crime in the effort to support their wives and children. But during the other age periods the unmarried men surpass the married in their criminality. This is probably due in part to the fact that family life has a stabilizing effect upon men, and thus restrains them somewhat from crime. But it is doubtless due in considerable part to the fact that the criminal class is less likely to marry than the non-criminal class, thus enhancing the criminality of the unmarried.

The married women present a striking contrast to the married men in the above table, for their criminality surpasses that of the unmarried women throughout their lives. This seems to contradict the Dutch and Swiss statistics given above which indicated that the unmarried women were more criminal than the married. But those tables did not differentiate with respect to age, so as to make it possible to compare the married and the unmarried of the same age groups. The German statistics with respect to the specific crimes indicate that the higher criminality of the married women is due largely to an excessive number of convictions for insult, and to a smaller extent to numerous convictions for breach of the peace and assault and battery. Aschaffenburg asserts that this is due to the fact that the poorer classes are crowded together in tenements, etc., thus giving rise to much friction among the women most of whom are married.[1]

Bonger expresses the opinion that the high criminality of the married women is due to the fact that a greater proportion of the total number of unmarried women is in the middle and upper classes than in the poor classes. Consequently, inasmuch as there is comparatively little criminality in the middle and upper classes, this situation lessens the criminality of the unmarried women.[2] Unfortunately we have no good detailed statistics of female criminality from any other countries, so that we cannot determine whether the situation in Germany is characteristic of the remainder of the world.

The widowed and divorced of both sexes display a high degree of criminality. This is probably due in considerable part to the

[1] *Op. cit.*, pp. 166–167. [1] *Op. cit.*, p. 462.

disturbing effect of losing a spouse, and the consequent breaking up of the home. But it is doubtless also due in part to the fact that dissolution of marital unions by death or otherwise is more likely to take place in the poorer classes whose criminality is high than in the well-to-do classes whose criminality is low.

Briefly summarizing the above statistics, it is evident that female criminality tends towards crimes against property rather than towards crimes against the person and violent crimes.[1] It is also evident that female criminality begins later than male criminality,[2] probably largely because girls are kept in the home and watched over more carefully than boys. It is possible, however, that female criminals are more incorrigible, probably in part because the social reinstatement of the female criminal is more difficult than that of the male criminal.

Differences Between Men and Women

In attempting to explain the apparently lower criminality of women as compared with men, we must discuss first the differences between the sexes which are of significance in this connection. It is evident, to begin with, that woman's inferiority in physical strength shuts her out almost entirely from many kinds of crime requiring great physical strength, such as burglary, highway robbery, various forms of murder, etc. Furthermore, the relatively passive rôle of the female in sexual intercourse makes it almost impossible for her to commit certain kinds of sexual crimes, such as rape, however strong may be her desire to commit these crimes.

But there are many who believe that woman's lower criminality is also due to a moral superiority on her part. It seems to be a widespread opinion that the female sex is innately more moral

[1] "In Germany (1885–90) there were 21 female criminals for every 100 male. But the proportion differs for different crimes. For crimes against public order the proportion is only 9.1 per cent; for crimes against the person, 15.9 per cent; while for crimes against property it is 27.8 per cent." (R. Mayo-Smith, *Statistics and Sociology*, New York, 1895, p. 277.)

[2] "In the year 1888, while 20 per cent. of the *male* population of our local prisons in England and Wales were under 21, only 12 per cent. of the *female* prison population were under that age. On the other hand, women between 21 and 50, form a larger proportion of the female prison population, than men between the same ages do of the male prison population." (W. D. Morrison, *Crime and Its Causes*, London, 1902, p. 161.)

than the male sex. An objection to this opinion which immediately presents itself is that the parentage of every individual is bi-sexual, so that every woman inherits from a male as well as from a female parent, just as every man inherits from a female as well as from a male parent. Furthermore, the recent study of heredity furnishes evidence that the sexes are equally potent with respect to inheritance. Consequently, even if we were to assume that the first woman was an angel and the first man a devil, the bi-sexual inheritance of every succeeding generation would mix the male and female traits so that before long every individual, both male and female, would become a complex of angelic and diabolical traits.

At the same time it is true that the primary and secondary sexual traits persist and are monopolized in the main by their respective sexes. It is conceivable that in these permanent and distinctive sex differences may be found the basis for moral differences. The sex differences arise out of the genesic functions. Maternity, owing to pregnancy, lactation, etc., has much more influence upon the female than paternity has upon the male. The principal difference having moral significance probably is that maternity enhances the emotional traits of woman more than paternity enhances the corresponding traits of man. So that the sympathetic nature of woman may in some respects be superior to that of man.

But this apparent gain is, after all, dubious, because it has drawbacks which probably full compensate for it. The greater affectibility of woman also leads to greater instability and excitability of character. Furthermore, while woman's cerebral equipment for intellectual achievement may be as good as that of man, her affectibility is prone to interfere with her intellectual processes in such a fashion as to render her less logical and rational than man. Now both of these defects arising out of her sympathetic nature have a moral significance. Morality is concerned not only with the relationships within the home, but also with the wider relationships in society at large. While a profoundly sympathetic nature is of the utmost value in the rearing of children, both in the home and in society at large the sympathetic feelings need the intellectual guidance which converts them into the more complex and more valuable trait which we may call sympathetic imagination. Consequently, we have

no reason to believe that woman has innate traits which render her more moral (*e. g.*, more adaptable to life in society) than man,[1] so that we shall have to look elsewhere for an explanation of her apparently lower criminality.

Another sex difference which has been used to explain the apparently higher criminality of man is the greater variational tendency of man. A vast mass of evidence has been accumulated by biologists and psychologists which indicates that the male sex varies more than the female sex.[2] This fact should perhaps be correlated with the fact that the female resembles the child more than the male resembles the child. Furthermore, it is frequently alleged that the male is more katabolic, the female being relatively anabolic. That is to say, the male is said to be more active and initiative, thus expending energy more freely, while the female is said to be more passive and to be storing up energy. The explanation of all these differences and alleged differences doubtless is that woman in her sexual traits is highly specialized for procreation. Consequently, aside from the specialization in her reproductive organs she is unable to vary away from the infantile type as much as man, while much of her energy and vitality is drafted for use in the performance of her genesic functions.

[1] It must be remembered throughout the above discussion that no moral traits *per se* can be inherited. Unfortunately there is not the space to discuss at length the sex differences which furnish an anatomical and physiological basis for moral differences. Havelock Ellis has summarized the data on the greater affectibility of woman in the thirteenth chapter of his *Man and Woman*, 5th ed., London, 1914. He closes this chapter with the following words:

"The affectability of women exposes them, as I have had occasion to point out, to very diabolical manifestations. It is also the source of very much of what is most angelic in woman — their impulses of tenderness, their compassion, their moods of divine childhood. Poets have racked their brains to express and to account for this mixture of heaven and hell. We see that the key is really a very simple one; both the heaven and hell of women are but aspects of the same physiological affectability. Seeing this, we may see, too, that those worthy persons who are anxious to cut off the devil's tail might find, if they succeeded, that they had also shorn the angel of her wings. The emotionality of women, within certain limits, must decrease; there are those who will find consolations in the gradual character of that decrease." (P. 425.)

[2] For brief summaries of this evidence, see H. Ellis, *op. cit.*; W. I. Thomas, *Sex and Society*, Chicago, 1907.

Some writers have questioned the existence of these sex differences. It is true that it is not easy to prove their existence conclusively, because it is difficult to determine upon unit characters and then to ascertain their comparative variability in the two sexes, and because environmental and social factors influence the relative activity of the sexes. But it is highly probable that the male sex is more variable. The significance of this greater variability for our purpose is that the male sex probably varies more than the female sex in certain directions which lead to crime. For example, the available statistics indicate that there is more male than female amentia, and probably more male than female insanity. The male sex probably varies more from the normal in other respects as well which lead to crime.

It is hardly necessary to add that the male sex varies from the normal more than the female sex also in the direction of unusual ability and genius, so that the excessive degree to which it varies in injurious ways is doubtless fully compensated for by excessive variation in useful directions.[1]

Lenient Treatment of Female Criminals

Woman is favored in the repression and treatment of crime, thus lowering somewhat the statistics of her criminality. The victims of female criminals are not so likely to complain against them as they would be to complain against male criminals. The detected female criminal is frequently not prosecuted so vigorously as the male criminal. When brought to trial she is more likely to be acquitted.[2] Men, though stern towards culprits of their own sex, are liable to display sentimental weakness towards the female criminal. If she were tried by women this would probably not be the case. Even when convicted she is less likely to be sent to prison, since judges usually try if possible to avoid sending a woman to prison and to deal with her more leniently.

[1] For criticisms of the theory that the male sex varies more than the female sex, see, Leta S. Hollingworth, *Variability as Related to Sex Differences in Achievement*, in the *Am. Jour. of Sociology*, Vol. XIX, No. 4, Jan., 1914, pp. 510–530; Helen Montague and Leta S. Hollingworth, *The Comparative Variability of the Sexes at Birth*, in the *Am. Jour. of Sociology*, Vol. XX, No. 3, Nov., 1914, pp. 335–370.

[2] For statistics of the relative number of acquittals of male and female criminals, see, W. Bonger, *op. cit.*, pp. 471–472.

There has, perhaps, been a slight amount of justification for this favoritism towards woman, because it is usually more difficult for a female ex-convict to reinstate herself in society than it is for a male ex-convict. But this leniency has served to cover up and hide a part of woman's criminality.

Woman Shielded from Criminality by Her Secluded Life

We now come to the two principal causes for the apparently lower criminality of women. The first is that women obtain much fewer opportunities to commit crimes than men. Woman's sphere of activities has almost invariably been within the home, frequently much secluded from the outer world. Up to the present time they have not taken part to any great extent in the economic occupations and the professions outside of the home. They have not been subjected to the same extent as men to the bitter economic struggle for existence, which is borne for them in part by the men. Occupied within the home with their household and maternal duties they have been shielded from many temptations to commit crimes in the course of economic activities, from many corrupting influences, and to a large extent from alcoholic stimulation.

Furthermore, this seclusion has accentuated the moral timidity which probably arises out of the distinctively female traits which I have already described, and which lessen woman's initiativeness. In similar fashion, this seclusion added to these innate traits has strengthened her religious sentiment, and has made her more superstitious and more amenable to the influence of the priest. While I have shown in Chapter VIII that religion probably is not in the long run a force against crime, it is possible that religious sentiment coupled with moral timidity has intimidated women from a certain amount of crime.

It is, therefore, to be expected that as woman's position becomes more like that of man her criminality will increase. That this has already happened has been illustrated in the statistics cited earlier in this chapter. These indicate that in the more civilized countries where women have entered the economic occupations and the professions to a considerable extent so that her social position has become more like that of man, her crim-

inality is much higher than in the less civilized countries where she is still much secluded in the home. The available statistics indicate that her criminality is rapidly increasing as she is attaining a greater degree of economic independence. This does not mean necessarily that her criminality will ever reach that of man, however much her social position may become like that of man, for there will always remain the innate physical and mental differences between the sexes which tend to depress the relative criminality of woman.

Extra-Judicial Female Crimes

The second great reason for the apparently lower criminality of women is that there are many more extra-judicial female crimes than there are extra-judicial male crimes. That is to say, there are many more crimes committed by women which are not recorded in the judicial statistics than there are of unrecorded crimes committed by men. This is due partly to the favoritism shown to women which is mentioned above. But it is due principally to the fact that female crimes are more difficult to discover than male crimes. A much higher percentage of female than of male crimes are crimes of complicity. It is obviously more difficult to detect crimes of complicity than crimes which are committed overtly. Many a male criminal is being aided by a female accomplice who remains in the background. The fact that the judicial statistics reveal so large a number of female receivers of stolen goods is a slight indication of the extent of female complicity. Furthermore, many a man is instigated to commit a crime by a woman, even though she may not become guilty of complicity in the technical sense. In fact, there is evidence of so great an excess of female over male extra-judicial crime that some writers have come to the conclusion that it fully compensates for the deficiency in female judicial crime.[1]

[1] Léale expresses this opinion in the following words: —

"La femme est moins criminelle que l'homme au point de vue de la criminalité judiciaire. Absolument parlant, c'est-à-dire eu égard à la délinquance réelle, on ne peut pas admettre que la femme soit moins criminelle que l'homme, autrement dit que le coefficient de criminalité soit plus élevé pour les hommes que pour les femmes." (H. Léale, *De la criminalité des sexes*, in the *Arch. d'anth. crim.*, Vol. XXV, June, 1910, p. 430.)

He characterizes the relative criminality of the sexes as follows:

"La force du penchant au crime ne diffère pas chez les deux sexes. Ce-

However, it is doubtful if woman's criminality equals that of man, even when her extra-judicial crimes are included. Both on account of her innate traits and her social position, her anti-social tendencies are more likely to take an immoral form which is not criminal, even though it may do as much harm as many kinds of crime. We have reason to believe that women excel men in deceitfulness, lying, hypocrisy, malicious gossip, back-biting, slander, nagging, etc., and a weaker sense of social solidarity and of justice. Some of these traits are not even called vices usually, to say nothing of not being crimes. And yet it goes without saying that they are perpetual causes of friction in society, and give rise to an immense amount of unhappiness. So that while women are saved from a certain amount of crime by their secluded manner of living, they do not acquire the broader outlook upon life which would save them from many of the above immoralities.[1]

Hence it is that so far as it is possible to compare the sexes with respect to morality, they probably average up about the same, but it is impossible to make a strict comparison, for they differ from each in such a manner as to be complementary to each other, so that they cannot be judged by exactly the same standard.

Prostitution and Crime

Before closing this chapter it is essential to touch briefly upon the relation between prostitution and crime. Some criminologists have regarded prostitution as being in large part a female equivalent of crime among men. Indeed, Lombroso and Ferrero

pendant, la quantité réelle des crimes commis par eux peut être différente, et sera supérieure chez celui des deux sexes dont le penchant aura été stimulé et secondé davantage par tout un ensemble de circonstances fortuites et par l'influence du milieu propre à chaque sexe." (P. 430.)

[1] For further discussion of female criminality reference may be made to the following works: C. Granier, *La femme criminelle*, Paris, 1906; C. Lombroso and G. Ferrero, *La donna delinquente*, 3d ed., Turin, 1915; Pauline Tarnowsky, *Les femmes homicides*, Paris, 1908; N. Colajanni, *La sociologia criminale*, Vol. II, Catania, 1889; A. Corre, *Crime et suicide*, Paris, 1891, Bk. II, Chap. 5; Frances A. Kellor, *Experimental Sociology*, New York, 1901; H. L. Adam, *Woman and Crime*, London, 1914. Part of the treatise by Lombroso and Ferrero is translated under the title of *The Female Offender*, New York, 1895.

go so far as to classify the prostitutes with the criminals and to study them as such, thus making the sum total of female criminality equal to if not more than the sum total of male criminality.[1]

There is a small measure of truth in this theory. Some women become prostitutes who would become criminals if more or better opportunities for criminal careers presented themselves to them. Among these are some feebleminded and a few insane women, and others who are abnormal in various ways. Some of them, perhaps many of them, enter upon a career of prostitution because it is the easiest way for them to secure the clothes and jewelry which their vanity demands, and to live the life of luxury which their weak and idle natures crave. A man who wishes to attain similar ends is forced to embark upon a criminal career. Owing to the severe social condemnation of prostitution, a woman who enters upon a life of prostitution is likely to be somewhat brazen and hardened to public opinion to start with. Furthermore, prostitution usually has a degrading effect upon women, and frequently leads them to crime or to complicity in crime.

But it is, in my opinion, an egregious error to identify prostitution with crime, even though it is sometimes stigmatized by the law as criminal. While it is usually regarded as a grave violation of the existing moral standard, it should if anything be called vicious rather than criminal. This is true, in the first place, because both the actions of the prostitute frequently and of her customer almost always are due to natural human impulses, and they act in mutual agreement with each other, so that their conduct does not give rise usually to conflict between individual interests, as is the case almost invariably with criminal conduct. In the second place, many women are forced into prostitution by economic necessity, because there are not enough openings for women in industry and the professions. Consequently, prostitution is to a large extent a female professional activity, and is more the equivalent of male occupational and professional activities than it is of male criminality.

[1] See their treatise mentioned above in which the data with regard to prostitutes and female criminals are intermingled and combined with each other in such a fashion as to make prostitution and female criminality identical, or, to say the least, strictly analogous.

The above statements can be made with a measure of truth of male criminality as well, for it also is due in part to natural but unregulated human impulses, and is in a sense professional when men are forced into criminal careers by economic necessity. But these features are much more characteristic of prostitution. Inasmuch as prostitution rarely ever leads to a violent conflict of individual interests, as is true almost invariably of criminal conduct, it should, when harmful to society, be called a vicious rather than a criminal form of conduct.

PART IV

CRIMINAL JURISPRUDENCE

CHAPTER XVI

THE EVOLUTION OF CRIMINAL LAW AND THE CLASSIFICATION OF CRIMES

The origin of criminal law: private vengeance; the *lex talionis;* composition — Influence of despotic, class, and priestly rule — Penal codes — The Roman law — The English common law — The king's peace — Crimes classified as acts — Functional classifications of crimes — A subjective classification of crimes — Relation between the criminal and the civil law.

In primitive communities social control operates through the powerful forces of custom, public opinion, tradition, magic, and religion. Law in the strict political sense of the term cannot exist in these communities. In higher stages of culture, namely, in barbarous and semi-civilized societies, the above-mentioned forces still continue to exercize a powerful influence. But there are at least two new important factors for social control. The first of these is the art of writing which makes possible an accurate, permanent record of laws, in the place of the inaccurate, word-of-mouth record of tradition. The second is the state which has now evolved from the simpler clan and tribal organization. The organization of the state brings into being a strong, centralized government over a definite area of considerable extent and over a large number of people. It creates executive and legislative authorities for the promulgation and legislation of laws, and judicial authorities for their interpretation and administration, to a degree which is not possible in the simpler forms of social organization. So that written law now comes to be one of the most important agencies of social control.

The Origin of Criminal Law

Some of the offenses of which the law now takes cognizance were formerly subject to private vengeance. Many of the offenses in primitive society are subject to private vengeance under the so-called *lex talionis* or law of retaliation (an eye for an eye, a tooth for a tooth, a life for a life, etc.). Without

social regulation private vengeance is likely to become excessive, and to give rise to disorder. Blood feuds arise between families, clans, and sometimes tribes, and continue for a long time to cause much loss of life.[1] So that it was to be expected that with the establishment of the state society would attempt to regulate this prolific source of disorder. Such regulation was accomplished, not necessarily by making private vengeance public, but by specifying through the law the limitations of private vengeance, and by establishing courts of justice which should decide when private vengeance might be exercized.

Many of the ancient penal codes are devoted in part to describing the offenses in which the victim may take private vengeance, and the kind of vengeance permitted. A judgment of a court in such a case permitted the victim to wreak vengeance if he chose to do so, but did not usually require it of him. As time went by, the practise of compounding for these offenses developed. It became possible for the offender to escape vengeance by making a money payment (Anglo-Saxon, *bot* and, *wergild*) [2] to the victim.[3]

From the early social and legal institutions of private vengeance and of the composition of wrongs there developed a considerable part if not all of the civil law and a part of the criminal law. In some of the cases in which it came to be recognized that it was to the public interest that the offender be punished, the victim failed to exercize his right of vengeance, so that the offender went scot free. Consequently, these offenses gradually became public wrongs or crimes, and are now punished by society under the criminal law. The scope of the criminal law has expanded with the increased complexity of the life and organization of the community.

Influence of Despotic, Class, and Priestly Rule

Primitive society is more or less democratic in its character. It is too simple to permit of great differentiation in the way of status. The elders, magicians, and chiefs, of course, have much

[1] *Cf.* H. E. Seebohm, *On the Structure of Greek Tribal Society*, London, 1895, pp. 41–45.

[2] According to the Standard Dictionary, *bot* = profit, *wer* = man, *gild* = payment.

[3] *Cf.* Frederic Seebohm, *Tribal Custom in Anglo-Saxon Law*, London, 1902.

influence. But it is ordinarily impossible for one individual or class to dominate for any great length of time. But as we pass from the tribal organization to the settled village communities, and especially to the state and the nation, there arises the autocratic and despotic power of kings, while, as a result of the increasing complexity of the political organization due to the development of the state, and of the economic organization due to the extension of the division of labor, there appear ruling classes.

Despots and ruling classes have used their power to make many new crimes in their own interest, and to enforce the criminal law in the most drastic fashion. Throughout the long and turbulent period during which nations and states were being formed, which in some parts of the world has lasted down to the present day, despots and ruling classes have exploited the masses partly by means of the criminal law. It is only very recently that the modern democratic movement inspired by a humanitarian ideal has ameliorated the law, and has greatly diminished the extent to which it is used as a means of exploitation. On the other hand, it is true that centralized power has been needed at certain times and places to bring into being a strong and effective government.

Despots and ruling classes have been greatly helped by religion. It has almost always been to the interest of the priestly class to league itself with despots and ruling classes and to give them religious sanction for their tyrannical acts. In many of the nations which evolved from a tribal organization the tribal god developed into a powerful and frequently a vengeful deity. Consequently, it became all the more desirable to avoid giving offense to this powerful spiritual being. Any offense which could in any sense be construed as offending the deity was severely punished. The priests have almost invariably encouraged the suppression of sins by penal measures because it has enhanced their power and prestige.

Kings have been much aided in wielding their power by the divinity which has been attributed to them partly because of their exalted position, but also for other reasons which I have not the space to state here.[1] As a divine or semi-divine person,

[1] See J. G. Frazer, *Lectures on the Early History of the Kingship*, London, 1905.

and as the vicegerent of the deity upon earth, a king was enabled to punish offenses against himself as being also against the deity.[1] Hence were derived the notions of the divine right and power of kings,[2] justice as emanating from the king, crimes regarded as "breaches of the King's peace," etc.

Penal Codes

There is not the space to describe the ancient penal codes of which historical records remain.[3] Among them are the criminal laws of ancient Egypt; the Babylonian code of Hammurabi; the oldest extant Hindu code, the Manava Dharma Sastra; the Hindu laws of Manu; the laws in the Hebrew scriptures, especially the Pentateuch; the ancient Greek law; the Twelve Tables of Rome; the Ta Tsing Leu Lee of China; the Tai-ho Ritsu of Japan; the Mahommedan criminal law in the Korân; the early Germanic criminal law quoted by Tacitus; the *Lex*

[1] *Cf.* E. Westermarck, *The Origin and Development of the Moral Ideas*, London, 1906, Vol. I, p. 194. "In the archaic State the king is an object of profound regard, and even of religious veneration. He is looked upon as a sacred being, and his decrees as the embodiment of divine justice. The transgression of any law he makes is, therefore, apt to evoke a feeling of public indignation proportionate to the punishment which he pleases to inflict on the transgressor. Again, as to acts which are supposed to arouse the anger of invisible powers, the people are anxious to punish them with the utmost severity so as to prevent the divine wrath from turning against the community itself. But the fear which, in such cases, lies at the bottom of the punishment, is certainly combined, with genuine indignation against the offender, both because he rebels against God and religion, and because he thereby exposes the whole community to supernatural dangers."

[2] The belief in the divine right of kings still survives even in certain so-called civilized countries. As recently as July, 1916, the German Emperor, William II, stated in a public address that he acted by "divine appointment." (*New York Times*, July 26, 1916, p. 10.) See Morton Prince, *The Psychology of the Kaiser*, Boston, 1915, Chap. III, "The Kaiser's Divine Right Delusion."

[3] Brief summaries of some of these codes are to be found in the following works: L. T. Hobhouse, *Morals in Evolution*, 2d ed., rev., London, 1915, Chap. 3; H. Oppenheimer, *The Rationale of Punishment*, London, 1913, Part II, Chap. 3; E. Durkheim, *De la division du travail social*, Paris, 1893, Chap. 4. See also the important treatises on the evolution of custom and law by Maine, Maitland, F. Seebohm, etc.

The text of some of these codes is to be found in A. Kocourek and J. H. Wigmore, Editors, *Sources of Ancient and Primitive Laws*, Boston, 1915.

Salica, probably the earliest Germanic code of which we have a written record; an ancient Slavic criminal code in the oldest Russian law book, the Ruskaïa Pravda; the ancient English laws in the Domesday Book; the ancient Irish law, or so-called Brehon law; the laws of ancient Mexico; the laws of ancient Peru; and various others which might be mentioned.

There are many systems of law in the world today. Each system has developed more or less independently, though most of them have been influenced at least a little by other systems. Some of these legal systems are to be found in barbarous and semi-civilized countries, and other systems in civilized countries.

I shall restrict this discussion to the legal systems of countries possessing civilization of European origin. These systems are derived almost entirely from two sources, namely, the Roman civil law and the English common law. The systems of Roman origin cover most of Europe, South and Central America, and smaller areas in other parts of the world. The systems of common law origin cover most of the British Empire and most of the United States.

I have stated above that in the early stages of cultural evolution many injurious acts were punished by private vengeance, usually with the approval of the community. Most of these acts later became either public or private wrongs under the law. The acts that were regarded as harmful to the whole community became crimes or public wrongs, to be punished under the criminal law; while those that were regarded as being harmful only to individuals became torts or private wrongs to be redressed under the civil law. It has usually been assumed that no questions of moral turpitude are involved in torts. There has always been and still is today more or less shifting of wrongs back and forth between the criminal and the civil law, so that an act which is at one time regarded as a private wrong is at another time regarded as a public wrong and *vice versa*.

Some writers on the evolution of criminal law have differentiated an intermediate type of law between criminal and civil law which they have called penal law. By this term they have designated the branch of the law formerly very extensive which enabled individuals to punish those who had injured them by imposing a money penalty or some other form of penalty upon them. But this branch of the law has gradually merged en-

tirely or almost entirely into the criminal and the civil law, because these offenses have become either crimes or torts. Other writers have applied the term penal to all law which provides a penalty for any kind of a wrong, whether public or private.[1] But it is now customary to use the term penal law as synonymous with criminal law, and I shall follow this usage in this book.

The Roman Law

The differentiating of the criminal from the civil law can be traced to a certain extent in both the Roman and the English law. The Romans developed much more fully the law of torts, the law of contracts, the law of testamentary succession, etc., than they developed the criminal law. This probably explains why the Roman law is frequently called the Civil Law (*Jus Civile* or *Corpus Juris Civilis*).[2] In the present work, however, I shall use the term civil law as applied to the branch of the law which has to do with private wrongs, contracts, etc., as distinguished from the criminal law.

The first written records we have of Roman law are to be found in the fragments of the Twelve Decemviral Tables (*Lex Duodecim Tabularum*) which have been preserved. These tables were prepared about the year 450 B. C., or about half a century after the beginning of the Republic, and apparently constituted a sort of codification of the existing laws. The eighth table is the *tabula de delictis* which contains the criminal section of this code.[3] Some of these delicts were apparently crimes in the

[1] *Cf.* R. R. Cherry, *Lectures on the Growth of Criminal Law in Ancient Communities*, London, 1890, p. 1. "The terms *Criminal Law* and *Penal Law* are by no means identical. Though with our modern notions we are apt to regard them as so, in the investigation of the laws of early communities the distinction between them must be clearly attended to. Penal Law is a term of wider signification than Criminal Law; it means that branch of law which deals with *punishment*, by whomsoever imposed and with whatsoever object. All Criminal Law is Penal in its nature, *i. e.*, it affects its ends by means of punishment, but all Penal Law is not Criminal."

[2] The term "Civil Law" is, however, sometimes limited to the Roman private law. "When we speak thus of the Civil Law we mean the whole system of usages and rules of private law adopted by the Roman people; their *jus privatum* as opposed to their *jus publicum* (including criminal and sacred law)." (Chas. F. Beach, *The Civil Law in America*, Paris, 1912, p. 2.)

[3] *Cf.* J. F. Stephen, *History of the Criminal Law of England*, London, 1883, Vol. I, pp. 9–11.

modern sense of the term, namely, offenses against the public. Among these were murder, perjury, and the making of disturbances at night; for all of which capital punishment in different forms is prescribed. On the other hand, breaking a limb, unless compensated for, was to be punished by retaliation; breaking the tooth or bone of a free man was punishable by a fine of 300 asses, of a slave, 15 asses; breach of trust with a deposit was punished by double damages. It is evident that these offenses were regarded as private wrongs against individuals, and were, therefore, punished by retaliation and compensation.

Later, when Roman jurisprudence had become well developed, delicts were divided into the following four classes: — (1) Theft (*furtum*); (2) Robbery (*vi bonorum raptorum*); (3) Injuries to property (*damnum injuriæ per legem Aquiliam*); (4) Injuries to the person (*injuriæ*).[1] Consequently, these classes included the two principal types of offenses to be found in every system of criminal law, namely, (1) Crimes against property; (2) Crimes against the person. Theft was divided into four sub-classes, namely, (1) Theft detected in the commission (*furtum manifestum*); (2) Theft not so detected (*furtum nec manifestum*); (3) Possession of stolen property discovered upon search (*furtum conceptum*); (4) The introduction of stolen property (*furtum oblatum*). The offenses against the person, or *injuriæ*, included not only physical damage to the body; but also violations of personal freedom, safety, and reputation, namely, assault, libel, slander, etc. At first the penalty prescribed by the Roman law for these offenses was retaliation, later it became damages, and finally under the empire most of these *injuriæ* came to be punished by the state as public wrongs.

Still later under the Empire, in the days of Justinian, crimes were classified as, (1) *Publica judicia;* (2) *Extraordinaria crimina;* (3) *Privata delicta.*[2] This classification was based upon the manner of prosecution.

There has been much discussion of the superior development of the civil over the criminal law in Roman jurisprudence. For example, Maine, speaking of early jurisprudence with special reference to the Roman system, says: — "If therefore the criterion of a *delict*, *wrong*, or *tort* be that the person who suffers it,

[1] *Cf.* R. R. Cherry, *op. cit.*, p. 66.
[2] *Cf.* J. F. Stephen, *op. cit.*, Vol. I, pp. 12*ff.*

and not the State, is conceived to be wronged, it may be asserted that in the infancy of jurisprudence the citizen depends for protection against violence or fraud not on the Law of Crime but on the Law of Tort." [1] Cherry suggests three reasons for the superior development of the Roman civil law, namely, (1) the form of government; (2) the essentially irreligious character of the people; (3) the existence of slavery.[2] From 509 B. C. to 27 B. C. Rome was a republic. Consequently, the power of the state was not so highly centralized as it is under a monarchy, and there was not so great a development of the punitive arm of the government as there usually is under a monarchical form of government.

Cherry asserts that the Romans did not punish sins, or offenses against the gods, because they believed that the gods themselves should avenge these insults. But he doubtless underestimated the extent to which magical and religious ideas influenced Roman jurisprudence, so that his second reason is probably only partially true. In every community the majority of crimes are committed by the lowest class of the population. In Rome the lowest class was composed largely of slaves. The masters of the slaves were civilly responsible for the acts of their slaves, and could punish the slaves. So that the Roman law did not have to exercize punitive measures for the restraint of slaves.

In any case, whatever may have been the reasons for the slow development of the criminal law under the Republic, it attained respectable proportions under the Empire. Furthermore, the legal procedure developed in the Roman jurisprudence has had a great influence, both directly and through the canon law. It must also be remembered that the criminal law and the civil law are always closely related, and that an efficient system of civil law usually lessens the amount of crime, thus reacting upon the criminal law. So that in various ways Roman jurisprudence has had much influence upon modern criminal law.

The English Common Law

The English criminal law has developed from several sources. It is difficult to ascertain to what extent it can be traced back

[1] H. S. Maine, *Ancient Law*, London, 1891, p. 371.
[2] R. R. Cherry, *op. cit.*, p. 75.

to the prehistoric inhabitants of the British Isles, since almost no records remain of the legal system of those inhabitants. The best record extant is of the ancient Irish or so-called Brehon law, which remained in force in a remarkably archaic form through several centuries of the Christian era. This system of law furnishes some indication of what the primitive law in Britain must have been like, as well as throwing a good deal of light upon the early evolution of jurisprudence.[1]

For several centuries the Romans held Britain as a colony. During this period they introduced the Roman law as well as the rest of the Roman culture, and developed a high degree of civilization in this colony. But it is difficult to ascertain how much of their law remained behind when they evacuated Britain

[1] The Brehon law has been briefly described in the following words:

"The study of the Brehon Law thus enables us to trace the progress of primitive ideas as to penal legislation generally. The earliest source to which we can trace back Penal Law is the principle of simple retaliation — an eye for an eye, a tooth for a tooth, life for life. This retaliation was not imposed, but simply permitted by society. The next step is the *custom* of buying off vengeance, either by the individual who has inflicted the injury, or his tribe. A pecuniary payment thus comes to be looked upon as a satisfaction for a crime. The wrong-doer gains his life: the injured man something valuable, in lieu of useless vengeance, his pride at the same time being appeased by the submission: society is benefited by an end being put to disturbance and fighting. Once the custom becomes general, disputes will certainly arise as to the amount of the payment. If the parties cannot come to terms both will lose; to avoid such a contingency they agree to refer it to the arbitration of the person who is most likely to know what was usually the amount paid in similar cases — this is the poet of the tribe, whose duty it is to recite its history at the tribal meetings. The ancient Irish Law expressly tells us that in former times the legal jurisdiction was vested in the poets. The next step is the direct intervention of the tribe itself, or its chief. The conduct of the man who refuses to submit his case to arbitration is plainly unreasonable. The whole tribe is interested in preserving peace — his conduct imperils it — they will endeavour to force him to submit. The retaliative principle again recurs here. If he refuses to pay fines, what more natural than to refuse to allow him to recover them? His honour-price is forfeited, and thereby he at once becomes a 'lawless man,' whom anybody may kill with impunity. The prototype of a modern criminal trial then appears in the solemn proclamation at the tribal meeting, by the King or chief, of this sentence of outlawry. We have no direct evidence that the Brehon Law ever attained to this latter stage of development — at all events it never passed beyond it." (R. R. Cherry, *op. cit.*, pp. 38–9.)

See also Laurence Ginnell, *The Brehon Laws*, London, 1894.

in the fifth century of the present era.[1] It may have left a few traces at that time. It goes without saying that later it had some influence indirectly through the relations between England and the Continental countries, especially through the canonical law which influenced English equity jurisprudence greatly. However, it is probable that the influence of Roman jurisprudence upon the evolution of English law has been comparatively slight.

Then came invasions of Britain by various peoples from Northern Europe, especially by two Teutonic tribes, the Angles and the Saxons. The Anglo-Saxons made the principal contribution to the law as they did to the language and to other phases of the culture of the English. Later came the Norman Conquest. But comparatively few Normans appear to have settled in England. Furthermore, the Normans also were of Teutonic origin, and had derived much of their jurisprudence as well as other phases of their culture from Teutonic sources, though they had acquired a language of Latin origin. So that the Normans seem to have had comparatively little effect upon English jurisprudence, though they had considerable influence upon the English language.

Let us now discuss briefly the principal traits of the early English criminal law.[2] Like every other system of punitive law it gives evidence of being based in large part upon the principle of retaliation, the *lex talionis*. In the Anglo-Saxon and in the early English law many offenses against persons and property were compounded. Three kinds of compensation may be mentioned which were to be paid according to the nature of the case. *Bot* was a general term for compensation of any kind, but was applied more particularly to compensation which varied according to the nature of the act committed. In case of theft it amounted to as much as or more than the value of the stolen goods. The *wergild*, or *wer*, was the price of a man

[1] *Cf.* L. O. Pike, *A History of Crime in England*, London, 1873, Vol. I, Chap. I.

[2] For more extended discussions of this subject see the historical works of Pollock and Maitland, Holdsworth, Stephen, etc. A very brief description is given by H. L. Carson in an article entitled, *A Sketch of the Early Development of English Criminal Law as Displayed in Anglo-Saxon Law*, in the *Jour. Crim. Law*, Vol. VI, No. 5, Jan., 1916, pp. 648–662.

which was determined by his rank, and was paid to his relatives in case of his death. But the *wer* was also sometimes the amount to be paid by a man when he had committed certain offenses other than murder. The *wite* was a fine to be paid to the king as a penalty for the breach of his peace, or to some other public authority.

If an offender failed to pay the compensation imposed upon him, he was outlawed. This meant that he lost all rights of person and property, that he lost his *wergild*, and therefore could be killed with impunity. The *wite* and outlawry mark steps towards treating offenses as public rather than as private wrongs, for outlawry became a sort of public punishment imposed and enforced by the courts, and the *wite* was an exercize of power on the part of the king or some other public authority for the administration of justice. This brings us to the subject of the king's peace, which became one of the principal instruments for the development of a true system of criminal law in England.

The king's peace began as a requirement that order must be maintained in the immediate vicinity of the king. Consequently, if a crime was committed within this region, it became not only an offense against the individual victim or victims of the crime, but also a breach of the king's peace, and therefore an offense against him which he had the right to punish. At first the king's peace extended only over a small area where he happened to be, and for a short distance around his palaces and castles. Later it was extended to other regions, as, for example, the public highway, and finally covered the whole kingdom. At first the peace did not exist during an interregnum between two reigns, which therefore was a time of great disorder. But later the peace became uninterrupted in time.

Various factors played a part in making the king's peace universal in extent.[1] Probably the most important factor was the increase in the power of the king and of the state. This was particularly true after the Norman Conquest. In fact, it was during the reign of William the Conqueror that the king's peace was extended over the whole kingdom. Another reason was an increase in the number of offenses which could not be com-

[1] *Cf.* W. S. Holdsworth, *A History of English Law*, London, 1909, Vol. II, pp. 38–40.

pensated with money. These included treasonable offenses, offenses against morality and religion, etc. Such offenses would escape punishment if not punished by the king. Another reason may have been an increasing number of persons who lacked kindred who could avenge offenses against them. Such persons might be manumitted slaves, members of a conquering people such as the Normans who had left their kindred behind, etc. In such cases it would become necessary for the king to take the place of the kindred in inflicting vengeance. The church also probably encouraged the extension of the king's peace by supporting the state, and by sanctifying the kingship.

The development of the king's peace in England is an interesting example of the influence of the monarchy upon the evolution of criminal law. It may be compared with a similar peace established by sovereigns in other countries, but it is doubtful if a royal peace was extended in any other country so far as it was extended in England. It may also be compared with the truce of God (*treuga Dei*) declared many times by ecclesiastics of the church and sometimes by sovereigns during the feudal period on the Continent in the effort to put a check upon private war.

The extension of the power of the king through the king's peace led to many harsh and cruel forms of punishment, some of which persisted down to recent times. But it must be remembered that the extension of the king's power came at a time when life and property received comparatively little protection, and when there was great need for a strong central authority. The institution of monarchy provided this protection, and the tradition of the monarchical authority is perpetuated to the present day in the indictment and other forms of prosecution in which is assumed the legal fiction that crimes are offenses against the king and the crown.

The common law, therefore, has its roots mainly in the Anglo-Saxon jurisprudence. Since the establishment of the king's peace it has been developed by the decisions of courts and the statutes passed by Parliament. In the evolution of the common law is exemplified the transition from the time when the majority of offenses were private wrongs or torts to be punished by blood-feud or composition to the time when many of these became public wrongs or crimes in the strict sense of the term

to be punished by the state.[1] So that the common law furnishes an interesting and striking example of the more or less spontaneous and unintended development of organized social control.[2]

[1] "On the eve of the Norman Conquest what we may call the criminal law of England (but it was also the law of 'torts' or civil wrongs) contained four elements which deserve attention; its past history had in the main consisted of the varying relations between them. We have to speak of outlawry, of the blood-feud, of the tariffs of *wer* and *bôt* and *wite*, of punishment in life and limb. As regards the malefactor, the community may assume one of four attitudes: it may make war upon him, it may leave him exposed to the vengeance of those whom he has wronged, it may suffer him to make atonement, it may inflict on him a determinate punishment, death, mutilation, or the like." (F. Pollock and F. W. Maitland, *The History of English Law Before the Time of Edward I*, Cambridge, 1895, Vol. II, p. 447.)

[2] The evolution of public justice has been well summarized by another writer in the following words: —

"Briefly to resume the main phases in the evolution of public justice, we find that at the outset pure anarchy or self-redress is qualified first by the sense of solidarity within the primary social unit. This expresses itself first in the repression of offences, especially of a sacral character, held dangerous to the group as a whole, and then in the control of self-redress. As between the primary units a system of collective self-redress arises which in turn yields to the authority of chief or council representing the larger community as a whole. As long as the vindication of rights rests mainly in the hands of the kindred or other group, responsibility is collective, intention is apt to be ignored and punishment is not assessed according to the merit of the individual. When retaliation is mitigated by the introduction of money payments no change in ethical principle occurs. It is only as social order evolves an independent organ for the adjustment of disputes and the prevention of crime, that the ethical idea becomes separated out from the conflicting passions which are its earlier husk, and step by step the individual is separated from his family, his intentions are taken into account, his formal rectitude or want of rectitude is thrown into the background by the essential justice of the case, appeals to magical processes are abandoned, and the law sets before itself the aim of discovering the facts and maintaining right or punishing wrong accordingly.

"The rise of public justice proper necessitates the gradual abandonment of the whole conception of the trial as a struggle between two parties, and substitutes the idea of ascertaining the actual truth in order that justice may be done. That is at first carried out by supernatural means, viz., by the Ordeal and the Oath. These in turn give way to a true judicial inquiry by evidence and rational proof. The transition occurred in England mainly during the thirteenth century, the turning point being marked by the prohibition of the Ordeal by Innocent III, in 1215. The early stages of public justice administered by the recently developed central power led to excessive barbarity in the discovery and punishment of crime. It took some more centuries to prove to the world that efficacy in these relations could

It is unfortunate that Anglo-American jurisprudence has not been influenced more by the Roman law. The legal systems based upon the Civil Law have usually been codified, and have revealed the philosophic spirit and the orderly arrangement characteristic of the Roman law. The most notable modern example of this sort is the *Code Napoleon*, created at the beginning of the nineteenth century by order of Napoleon the First, which incorporated a large part of the Civil Law, and which still constitutes a large part of the jurisprudence of France as well as of many other countries.

The common law, on the contrary, evolved in a more or less hit-or-miss fashion from judicial decisions, some of which have been good, while other decisions have been exceedingly bad. The constant search for precedents inevitably dulls the philosophic sense. Consequently, as I have said in my book on criminal procedure, "English and American jurists and legal writers have concerned themselves very little with the philosophic aspect of the principles they have studied, being principally interested in tracing them to their origin in judicial decisions. This is quite in contrast with Continental jurists and writers who have always paid a great deal of attention to the philosophic aspect of legal principles. It has been a great loss to our law that it has not been treated in this philosophic spirit. This treatment would be a valuable criticism of some principles, in the case of others it would greatly broaden their application. Especially true is this of criminal law which should always keep the pace with the sciences and philosophy which deal with social relations. The fundamental nature and the ultimate object of criminal law should always be kept in view, and its applications always adjusted to the current conception of this object." [1]

Crimes Classified as Acts

The simplest method of classifying crimes is by means of a category of acts, that is to say, by grouping together the criminal

be reconciled with humanity and a rational consideration of the best means of getting at truth. By so long and roundabout a process is a result, so simple and obvious to our minds, attained." (L. T. Hobhouse, *Morals in Evolution*, 2d ed., rev., London, 1915, pp. 130–131.)

[1] *The Principles of Anthropology and Sociology in Their Relations to Criminal Procedure*, New York, 1908, pp. 182–183.

acts which are similar to each other. Thus all forms of homicide would be grouped together, all forms of theft would be grouped together, etc. This method of classification is frequently used in penal codes. But legal classifications of crimes are also frequently based upon the kinds of procedure used in trying criminal cases and upon the degrees of severity of the punishments inflicted. Another method of classifying crimes which is not frequently used in legal classifications is the functional method, that is to say, according to the purposes to be attained by punishment.

In the common law there gradually evolved a three-fold classification of crimes, namely, (1) Treason; (2) Felony; (3) Misdemeanor. Treason seems at first to have been regarded as one of the felonies, but in course of time became sharply differentiated. It is by definition an act which is directed at the existence of the state itself. But in the old English law many acts directed against the king and members of the royal family were treasonable, and the same is still true of several of these acts. As to whether or not these acts should be classified as treasonable depends, of course, upon whether or not they are in reality directed against the state itself, and this in turn depends upon the nature of the state. In all probability in the great majority of cases it has not been justifiable to classify acts against the royal family as treasonable, for they have not menaced the existence of the state itself, and such criminal laws have been examples of the abuse of monarchical power.

The felonies were originally the offenses which were unemendable, that is to say, which could not be compounded because of their heinousness.[1] They were punished by the forfeiture of the criminal's estate, and frequently of his life. There were seven felonies distinctly recognized by the common law, three of which are against the person, namely, murder, manslaughter, and rape; and four of which are against the property of individuals, namely, arson, burglary, theft or larceny, and robbery. Three other crimes, namely, wounding, mayhem, and

[1] See, for a discussion of the evolution of felony, Pollock and Maitland, *op. cit.*, Vol. II, pp. 460–509. "At all events this word, expressive to the common ear of all that was most hateful to God and man, was soon in England and Normandy a general name for the worst, the utterly 'bootless' crimes. In later days technical learning collected around it and gave rise to complications, insomuch that to define a felony became impossible; one could do no more than enumerate the felonies." (P. 464.)

false imprisonment, have at one time or another been called felonies; while, as we have seen, treason was apparently originally a felony. But to these so-called common law felonies have been added by means of statutes enacted by Parliament numerous other felonies, so that the total number of felonies is now very great.

The misdemeanors, originally known as "transgressions" or "trespasses," were and are still the crimes less grave than the felonies. But in recent years there has been recognized a group of petty offenses which are distinguished both from felonies and misdemeanors, because they are tried by a modern method of summary procedure without a jury. No suitable name has as yet been applied to them. The term "trespass" could appropriately be revived and applied to this group of the most trivial of crimes.

A present day authority on English criminal law has classified crimes in that law in the following manner: — [1]

"Public wrongs, Pleas of the Crown, or — to use a phrase more familiar but more ambiguous — Crimes, may be arranged, according to their technical degrees of importance, in the following series of groups.

"I. Indictable offences; *i. e.*, those which admit of trial by jury.

"(1) Treasons,

"(2) (Other) Felonies,

"(3) Misdemeanors.

"II. Petty offences, *i. e.*, those which are tried summarily by justices of the peace sitting without a jury."

The criminal law of all of the United States, with the exception of one state (Louisiana), is based upon the English common law. In this country treason consists of acts committed against the United States or against an individual state. The common law felonies are included in most if not all of the American penal codes, and also many of the English statute felonies and misdemeanors. The common law classification is also followed in a general way. For example, the New York State Penal Code gives the following classification of crimes: — [2]

[1] C. S. Kenny, *Outlines of Criminal Law*, Cambridge, 1902, p. 91.

[2] *Penal Law of the State of New York*, edited by A. J. Parker, New York, 1915, Art. I, Sec. 2.

"Division of crime. A crime is

"1. A felony; or,

"2. A misdemeanor.

"Felony. A 'felony' is a crime which is or may be punishable by

"1. Death; or,

"2. Imprisonment in a state prison.

"Misdemeanor. Any other crime is a 'misdemeanor.'"

The classifications which have so far been mentioned have been determined mainly by legal considerations, that is to say, by the different kinds of procedure used and the degrees of punishment inflicted. The same is true of the criminal law of Continental countries, which is based in the main upon Roman jurisprudence.

In the French penal code offenses are divided into three classes, namely, crimes, misdemeanors, and trespasses (*crimes, délits, et contraventions*), according to the penalties prescribed by the law.[1] Crimes (*crimes*), which are the most serious offenses, are punished by death, penal servitude, transportation, military imprisonment, solitary confinement, banishment, or civil degradation. Misdemeanors (*délits*), which are less serious, are punished by imprisonment for over five days, fine of over fifteen francs, or deprivation of the exercize of certain civil and family rights. Trespasses (*contraventions*), the most trivial of offenses, are punished by imprisonment from one to five days, or by a fine of from one to fifteen francs. This classification has been adopted by the majority of the Continental codes, as, for example, by the German code of 1870, and was retained in the Belgian code of 1867.[2]

A bipartite classification of offenses was adopted by the Dutch code of 1881, and in the Italian code of 1889. According to this classification offenses are divided into misdemeanors and trespasses (*délits et contraventions*). Misdemeanors are offenses of every degree of gravity which are intentional and immoral. Trespasses are unintentional offenses, which are therefore presumably not immoral.

[1] *Cf.* E. Jarno, in *The Penal Codes of France, Germany, Belgium and Japan*, edited by S. J. Barrows, Washington, 1901, pp. 15–17. See also *Les codes de la république francaise*, edited by A. F. Teulet, Paris, 1881.

[2] *Cf.* F. von Liszt, Editor, *Le droit criminal des états européens*, Berlin, 1894.

Let us now consider the acts themselves which have been and are stigmatized as criminal. We find ourselves before a bewildering array, because at one time or another a vast number of acts have been criminal. It is therefore impossible to prepare a universal category of crimes. Many acts which at certain times and places have been criminal have at other times and places been regarded as moral. In order to illustrate in a concrete instance the range of acts stigmatized, I will enumerate some of the acts which under given conditions are criminal according to the New York State Penal Code. Among them are abduction, abortion, adultery, anarchy, arson, assault, attempt to commit crime, bigamy, bribery and corruption, burglary, compounding crime, contempt of court, crime against nature, disorderly conduct, dueling, extortion and threats, forgery, fraud and cheats, gambling, homicide, incest, indecency, intoxication, kidnapping, larceny, libel, maiming, malicious mischief, nuisances, perjury and subornation of perjury, prize-fighting and sparring, rape, riots and unlawful assemblies, robbery, sabbath-breaking, seduction, suicide, treason, usury.

But a mechanical, alphabetical enumeration of criminal acts does not furnish a clear picture of the kinds of acts stigmatized by the criminal law. A better picture is furnished by means of a functional classification, in which crimes are classified according to the ends subserved by the law.

Functional Classifications of Crimes

A clearcut functional classification which is frequently used is the following: —

1. Protection of the person (life and limb).
2. Protection of private property.
3. Protection of government and other public interests.

It is easy to classify the great majority of crimes under one or another of these three heads, though doubt may arise as to the correct classification of a few crimes. Furthermore, there are few if any crimes which do not fall under one or another of these classes.[1]

[1] Stephen gives a classification similar to the above but a little more detailed, *op. cit.*, Vol. I, p. 3.

Another classification which is less clearcut but more detailed is the following: — [1]

1. Crimes against public justice.
2. Crimes against public peace.
3. Crimes against public trade.
4. Crimes against public health.
5. Crimes against public policy.
6. Crimes against the persons of individuals.
7. Crimes against the property of individuals.
8. Attempts.
9. Solicitations.

This classification has been somewhat influenced by legal considerations, but is in the main functional in character.[2]

Another functional classification, proposed by Durkheim, is based upon the collective feelings or sentiments which are violated by the criminal acts.[3]

Laws Prohibiting Acts Contrary to the Collective Sentiments

I

Having General Objects

1. Religious sentiments.
2. National sentiments. (Treason, civil war, etc.)
3. Domestic sentiments.
4. Sentiments with regard to sexual relations.

[1] W. C. Robinson, *Elementary Law*, Boston, 1882.

[2] Freund suggests the following classification:
(1) Political offenses.
(2) Statute violations.
(3) Administrative crimes.
(4) Police offenses.
(5) Crimes against morality.
(6) Common or ordinary crimes.
He alleges that in this classification crimes have been grouped "according to the great categories of the interest attacked or violated." But it is difficult to discover, even with the aid of his own explanation, any consistent principle underlying it, and it is obviously much confused. (E. Freund, *Classification and Definition of Crimes*, in the *Jour. Crim. Law*, Vol. V, No. 6, Mar., 1915, pp. 807–827.)
For a more intensive discussion of the classification of crimes see, R. de la Grasserie, *De la classification des actes criminels*, in the *Revue internationale de sociologie*, Vol. IX, No. 8–9, Aug.–Sept., 1901, pp. 613–632.

[3] E. Durkheim, *De la division du travail social*, Paris, 1893, pp. 166–8.

5. Sentiments with regard to work. (Mendicancy, vagrancy, etc.).

6. Various traditional sentiments with regard to professional usages, food, dress, ceremonial, etc.

7. Sentiments with regard to the organ of the common consciousness. (Rebellion, political corruption, etc.)

II

Having Individual Objects

1. Sentiments with regard to the person.

2. Sentiments with regard to private property.

3. Sentiments with regard to groups of individuals, either concerning their persons, or their property. (Counterfeiting, bankruptcy, arson, etc.)

This classification is suggestive of a psychological basis, but it is rather vague, and seems to overlap in some cases (as, for example, I, 2, and 7).

A Subjective Classification of Crimes

With the exception of the last one, the classifications which have been cited are mainly objective in their character. They are based largely upon the material things which are injured by the crimes, such as the persons of the victims, their property, etc. But in many cases the things which are injured are relationships which are not material in their character. In fact, it might be possible to classify most if not all crimes according to the relationships violated by them. There would be the crimes which violate parental and filial relations, those which violate sexual and conjugal relations, those which violate the relations between the state and the citizen, etc. Such a classification of crimes would vary from time to time and from place to place according to the kinds of relations which existed, and the rights which had arisen out of these relations.

A subjective classification also might be devized which would be based upon the mental traits violated or, to say the least, aroused by the crimes. These would include the instincts, the feelings, the ideas which mankind has acquired, and the sentiments which are associations of ideas and feelings. So that crimes would be classified according to whether they aroused the instinct of pugnacity or the emotion of anger, whether they

opposed the sexual instincts or violated the parental feelings, whether they were incompatible with prevailing economic and political ideas, or whether they violated patriotic and religious sentiments. A thoroughgoing classification of this sort would be very elaborate and complex, and would require for its preparation an extensive knowledge of psychology and sociology. Such a classification also would vary from time to time and from place to place, because ideas and sentiments change greatly, and the instincts and feelings are much influenced by habit and custom, though their character as hereditary traits change very little if at all.

Relation between the Criminal and the Civil Law

Earlier in this chapter it has been noted that there is constant shifting back and forth between the criminal and the civil law, owing to changes in social conditions and public opinion. Thus a violation of a contract or a private wrong or tort may become a public wrong or crime, or *vice versa*. For example, it was customary formerly to imprison debtors as if they were criminals. Today the law usually regards a debt as a violation of a contract. This is doubtless correct in most cases, since most debtors fail to pay their debts because they are unable to do so. It must, however, be remembered that there are fraudulent as well as honest debtors, namely, debtors who have never intended to repay their debts, and who should, therefore, be treated as criminals.

In large cities there are numerous regulations such as municipal ordinances regarding sanitation, tenement houses, traffic, etc., violations of which are frequently classified as criminal. Many of these violations of the law are committed without criminal intent, but owing to ignorance or carelessness. By making these offenses criminal the tendency is to remove the stigma from criminality, and thus to diminish greatly the effectiveness of the criminal law. It would doubtless be preferable not to stigmatize them as criminal. It would perhaps be advisable to create for these unintentional violations a new category of offenses which are harmful to society, but which are committed without any criminal intent. These offenses would be intermediate between violations of the civil law and violations of the criminal law.

CHAPTER XVII

THE FUNCTIONS OF CRIMINAL PROCEDURE

The procedure of accusation — The procedure of investigation — English and French criminal procedure — Combination of the procedures of accusation and investigation: public prosecution — The reform of criminal procedure.

After criminal law came into existence it became necessary to devize a mechanism for applying it. To attain this end two things must be accomplished, namely, to determine that a crime has been committed, and to ascertain who committed it. Criminal procedure has evolved for the purpose of performing these functions, and operates through courts and judges.

The functions of criminal procedure are of the utmost importance to society. On the one hand, it is essential that every criminal be apprehended and his criminality proved. On the other hand, it is imperative that no innocent person shall be convicted and punished. The ideal procedure, therefore, would be too firm to permit the escape of a single criminal, and yet sufficiently flexible to prevent the prosecution and especially the condemnation of any innocent person. But an ideal procedure is impossible for the following reasons.

In the first place, nothing can be proved absolutely, strictly speaking, while in many cases the available evidence cannot make a decision more than probable. In the second place, the endeavor to ascertain the truth is greatly complicated by the opposition of social and individual interests in procedure. It is always difficult to preserve the balance between the rights of the individual and of society, but perhaps nowhere more so than in criminal procedure. On the one hand, the protection of society against crime requires strict measures of investigation and prosecution, which may sometimes result in the prosecution of an innocent person. On the other hand, individual liberty must be defended and conserved. The condemnation of an innocent person is a great shock to public sentiment, not only

as a violation of justice, but also because each person imagines himself or herself in the place of the victim, and realizes in what jeopardy every one is placed when such judicial errors are possible. However, in spite of these difficulties, it is essential to strive for a system of criminal procedure in which the possibility of error will be reduced to a minimum.

Prototypes of courts and judges and of systems of procedure existed before the evolution of written law. Among primitive peoples are found methods of hearing accusations and judging their accuracy, and of imposing penalties.[1] These methods are handed down from generation to generation by means of tradition. Sometimes the whole clan or tribe acts as the court of judgment. Sometimes the elders in the group or other designated persons serve as a court. Inasmuch as many offenses were contrary to religious beliefs, the priests and other authorized representatives of religion acquired more or less judicial power. As the chieftainship grew in authority, the chief acquired judicial power; and as the kingship evolved, it was the tendency for the judicial function to become centered in the king.

But with the evolution of written law the methods of procedure were recorded, and thus obtained a greater degree of certainty and fixity. The two principal types of criminal procedure which have evolved are the procedure of accusation and the procedure of investigation or inquisitorial procedure. The systems of criminal procedure of all nations of European civilization are based upon these two fundamental types.

The Procedure of Accusation

The procedure of accusation probably is the older of these two types of procedure. This type developed out of private retaliation inflicted by one individual upon another for a wrong suffered. Such acts of vengeance created a state of private war between individuals. It is not possible to describe in detail the evolution from this state to a form of legal procedure. Suffice it to say that the legal duel was established in which individuals fought

[1] See L. T. Hobhouse, G. C. Wheeler and M. Ginsberg, *The Material Culture and Social Institutions of the Simpler Peoples*, London, 1915, Chap. II, entitled "Government and Justice"; G. C. Wheeler, *The Tribe, and Intertribal Relations in Australia*, London, 1910, Chap. VIII, entitled "The Regulated Settlement of Differences, or Justice."

out their differences and redressed their grievances in accordance with prescribed rules. But as social and political conditions became more stable, it was no longer possible to tolerate a state of private war. Consequently, the procedure of accusation was developed to satisfy private grievances by peaceful legal means. Long after most individuals were forced to settle their grievances by means of this procedure, the upper classes still retained the privilege of the duel, as among the feudal lords who settled their differences by means of private war down to the end of the Middle Ages, and almost until the present time the duel has not been regarded as illegal in certain cases.

The fundamental theory of the procedure of accusation is that the trial is a combat between two individuals, similar to its predecessor the duel. It is a legal means of securing vengeance. This is manifested by the early forms of punishment, such as composition, *wergild*, etc. It is not until later that punishment is inflicted for the injury done to society. The only interest of society at first is that the dispute shall be decided and reparation gained by peaceful means. Therefore, the king or a judge as the representative of society acts as an arbiter between the opposing parties. The accusation must be made by a private individual, the injured person or "those of his lineage." The judge cannot start a criminal proceeding. It is a principle of this type of procedure that there can be no trial without an accuser. The examination into the facts of the case in this type of procedure is public, oral, and contradictory in order to give each party an equal opportunity to state its case.

This is the procedure of accusation in its original form. As the social importance of criminal procedure increased, the procedure of accusation began to vary from its original form, which was designed for the settlement of private disputes. When crimes came to be regarded as injurious to society, as well as to the individuals against whom they were committed, it became essential that all criminals should be prosecuted. But there was danger of impunity to many criminals under the procedure of accusation on account of apathy on the part of the accusers. In order to start a legal process against a criminal, it was necessary that the injured party should make an accusation. If this accusation was not made, the criminal went unpunished.

To remedy this failure to prosecute, the popular accusation

was introduced, by means of which any person could bring an accusation for crime committed, even if he was not the injured party. Laws have also been enacted prohibiting the compounding of crime, which is a transaction for the suppression of criminal pursuit and the cessation of a process already commenced, except with the consent of the court. However, even these measures have not proved sufficient, and existing systems based upon the procedure of accusation have been forced to adopt public prosecution.

Another danger of the procedure of accusation is that it will be used for the extortion of blackmail, or for the satisfaction of personal hatred where no grievance exists, or for the satisfaction of fancied grievances. Measures have been taken against this danger, such as the severe punishment of blackmail, penalties for malicious accusation and prosecution, a remedy at civil law by means of a suit for damages in case of prosecution upon no reasonable basis of facts. But even with these measures, supervision over the prosecution is needed, and has been introduced into most systems of criminal procedure.

The method of examination in the procedure of accusation has its defects. Its publicity frequently enables the accused to destroy incriminating evidence. The privilege of the accused not to testify if he so chooses deprives the court of a valuable source of information. The silence of the accused usually deprives society of a powerful weapon against crime, though sometimes it does injury to the accused himself, especially when he is innocent.

The Procedure of Investigation

The procedure of investigation, or inquisitorial procedure, seems to have originated in the Roman law, into which it was introduced during the latter part of its history. Later it was adopted by the Catholic Church and applied by the canonical law. In the Middle Ages the Church had a great deal of power, and many crimes were prosecuted in the ecclesiastical courts. Frequently crimes were prosecuted by the bishops, who acted as judges even when no complaint had been brought before them. This increased greatly the power of the Church, so that in course of time it became the regular procedure. Under the Inquisition it was very useful for prosecuting heretics and forc-

ing confessions from them. After being elaborated and greatly extended in the ecclesiastical courts it began to be adopted by the secular law. In France it was introduced into the penal system by means of royal ordinances, such as those of 1498, 1539, and a famous one on criminal procedure in 1670. In the *Constitutio Criminalis Carolina*, a criminal code promulgated in Germany under Charles V in 1532, it was recognized as the usual procedure. In this fashion it replaced in large part the procedure of accusation on the European Continent, and remained in force until the French Revolution, when it underwent great changes.

The procedure of investigation, like that of accusation, may never have existed in its pure form, but we can readily discern its principal features as a form of procedure. The underlying theory of this type of procedure is that the pursuit and punishment of criminals is of the utmost importance for society. Consequently, society has the right to commence a criminal process. This it may do, not necessarily by accusing some one of crime, but by making an investigation to determine whether a crime has been committed, or whether a certain person has committed a crime.

Therefore the judge, acting not as an arbiter between two parties, as in the pure form of the procedure of accusation, but as the representative of society, commences such an investigation, and, if he finds incriminating evidence, prosecutes the suspected person. His decision need not be based only on the evidence brought before him by the accuser, if there be one, and by the prisoner, but the judge himself may collect evidence. Theoretically, his position is as impartial as in the procedure of accusation. But, as frequently there is no accuser, and as he has to conduct the prosecution, the tendency is for the judge in the procedure of investigation to become prejudiced against the prisoner. This was one of the reasons why this form of procedure in the hands of the Catholic Church was a powerful weapon against its opponents, and an evil force for injustice and persecution, especially as used in the Inquisition.

The examination in the procedure of investigation is very different from the examination in the procedure of accusation. It is secret, written, and uncontradictory. The criminal process is no longer a contest between two personal adversaries. It is

the trial of the prisoner before a judge who is supposed to be impartial, but who represents society, which is the great opponent of the prisoner if he is found to be guilty. The process is not contradictory, because no opposing parties appear in the course of the trial. It is secret because it is in theory only an inquiry conducted by the representative of society, and this inquiry can be all the more searching if made in secret. It is written also because it is an inquiry, the only purpose being to gather as much evidence as possible, and to have it on record as a basis for judgment.

The procedure of investigation is a powerful instrument in the hands of the central government. The government is, of course, expected to use this power solely in the service of justice. But the danger always exists that it will be used by those in authority as a political weapon to further their own interests, and thus misused as it was by the Church. Furthermore, it is dangerous to put the power of prosecution and that of judgment in the same hands. Strictly speaking, there is no such thing as prosecution in the procedure of investigation, the trial being only an inquiry into the facts. But inasmuch as social interests are at stake, and as society is, in a sense, the opponent of the prisoner, the judge, as the representative of society, becomes the prosecutor. This tends to bias him against the prisoner, and thus unfits him for judging impartially.

The method of securing and presenting the evidence in the procedure of investigation has certain faults. The power of the judge in accepting and rejecting evidence is too arbitrary. If he begins his examination with a prejudice in favor of one side, he is likely to find the evidence in favor of that side, and to ignore the other. In fact, judicial functions are hardly compatible with an active investigation. In order that all the evidence in favor of a side be brought to light, it should be gathered and presented by some one interested in that side. It is hardly possible for one person to present all the evidence on both sides. While gathering the evidence he is likely to become biased in favor of one side or the other. In order to arrive at an impartial decision, the judge should come with a fresh and unbiased mind to a consideration of the evidence after it has been carefully prepared by others, and is then presented to him by the representatives of both sides.

The secrecy and uncontradictory nature of the procedure of investigation tend to limit the power of the prisoner to defend himself. His inability to contradict prevents him from replying directly to and explaining evidence offered against him while its impression upon the mind of the judge is still fresh. Still more is he hampered by the secrecy of the examination, which frequently prevents him from knowing what evidence has been found, so that he fails to reply to it when he is given the opportunity to testify. Consequently, while the principal object of the procedure of investigation is to protect society, it tends in practise to discriminate against the prisoner, and thus violates the rights of the individual.

English and French Criminal Procedure

The principal example of the procedure of accusation is the English system of procedure, though it has varied greatly from the pure form of this type of procedure. In theory, at least, the prosecution is private, but it is now done in the name of the king, which is a recognition of the interests of society in the prosecution, and in practise there is a great deal of public prosecution. The trial is conducted by the two opposing parties, and is public, oral, and contradictory. The judge acts as an arbiter, intervening only when questions arise as to how the process is to be conducted. From the decisions of judges regarding evidence has grown the English law of evidence, which is the largest body of rules regarding evidence in any system of law. The decision regarding guilt is made by a jury, which is a judicial institution developed by the procedure of accusation. Its underlying theory is that a man is to be judged by his peers, and it is a safeguard against the judges who, as representatives of the government, may wrongly prosecute and condemn in the name of society.

The leading example of the procedure of investigation is the French procedure. Since the French Revolution the French procedure has more or less influenced every Continental system of procedure. It goes without saying that it varies considerably from the pure form of this type of procedure. In France the preliminary examination of the accused is made by a magistrate called the *juge d'instruction*. This examination is almost entirely secret, only the counsel for the prisoner being present.

It is absolutely uncontradictory and a written record is made. The functions of the *juge d'instruction* constitute a survival of the Inquisition, and his position is similar to that of the Grand Inquisitor. The record of this examination in the form of depositions of witnesses is sent to the judge who is to preside at the trial. As a result of reading these depositions, this judge is liable to acquire a hostile attitude towards the prisoner.

The presentation of evidence is oral and public. But it is almost entirely uncontradictory, since the questioning of witnesses is done by the judge and there is no cross-examination. The rules of evidence are few and elementary, so that the judge is almost unrestricted in examining witnesses. The prosecuting is done by a body of public officials called the *ministère publique*. The principal contradictory feature in the trial is furnished by the speeches of the *procureur de la Republique*, or public prosecutor, and the counsel for the defense, after the examination of witnesses. After the French Revolution the jury was introduced into the procedure, and was a modification tending towards the procedure of accusation.

Combination of the Procedures of Accusation and Investigation

The procedure of accusation is based on the primitive theory of personal vengeance. The underlying theory of the procedure of investigation is more advanced, since it displays a higher conception of the function of penal procedure. But in practise it tends to violate individual rights in certain respects. To correct this fault in the procedure of investigation it is necessary to look to the procedure of accusation, which furnishes more safeguards to individual rights. The best procedure, therefore, must adopt the theoretical basis of the procedure of investigation, namely, the protection of society as the purpose of penal treatment, and those features of both types of procedure which will put this theory into practise. This has been the actual tendency in existing systems of procedure. The primitive theory of vengeance as a basis for penal treatment has been dying out, and is being replaced by that of the protection of society, while the systems based upon the two types of procedure have been rapidly approaching each other in practise.

The procedure of accusation leaves the prosecution of criminals to the injured parties. But this results in impunity for many criminals. Indifference, threats, bribes, and other considerations keep people from accusing and prosecuting. A first step towards remedying this failure of criminal justice was the popular accusation by means of which every citizen could accuse any other person of a crime. Montesquieu said that the popular accusation is suited to republics where patriotism is strong, but not to monarchies where this sentiment is weak.[1] But even in republics patriotism is not sufficiently strong to induce citizens to take the time and trouble to accuse, and to take the risk of making a false accusation. Therefore a public agency for the pursuit and prosecution of criminals is absolutely necessary.

In the procedure of investigation there is no prosecution, strictly speaking. The judge merely conducts an inquiry. But in practise it is his tendency, as the representative of social interests, to regard the prisoner as guilty, and therefore to prosecute. In order to remedy this evil, official or public prosecution was introduced into this form of procedure. Public prosecution is a combination of the two forms of procedure. It is prosecution by a person other than the judge, as in the procedure of accusation, but it is prosecution by a representative of society, and therefore harmonizes with the theory of the procedure of investigation. So that in the development of the method of prosecution the tendency has been towards the theory of the procedure of investigation, modified in practise, however, by the procedure of accusation.

Public prosecution brought with it the contradictory element, for it necessitated defense for the accused person. The contradictory debate aids greatly in arriving at a final decision. As a general rule, the judge should have nothing to do with the gathering and presentation of evidence. The evidence should be gathered by others, and then placed before him in the manner best calculated to reveal its significance. For this reason, the European Continental method, in which the judge questions the witnesses freely, thus conducting the presentation of evidence for both sides, is objectionable, even though it may somewhat hasten the trial.

It is impossible for a man to keep in mind all of the

[1] Quoted by C. Beccaria, *Crimes and Punishments*, Chap. XV.

considerations on both sides, and to bring out all of the significant points in the evidence. In order to accomplish this end, the examination of witnesses should be conducted by representatives of both sides, each bearing in mind the evidence favorable to his own side, and bringing it out in the presentation of the testimony. Each of these representatives would also be watching for contradictions and discrepancies in the evidence offered by the other side, and could expose them much more readily than the judge, who would be endeavoring to keep in mind at the same time the important points on both sides. If it were possible for one person to detect and expose these errors as readily as two persons, the procedure of investigation would be the best fitted for a criminal trial. But inasmuch as this is a mental impossibility, the system of examination and cross-examination and of the contradictory debate which has been developed by the procedure of accusation is the best fitted for the presentation of evidence, and for arriving at a final decision.

The Reform of Criminal Procedure

The following problems must be studied with respect to criminal procedure. In the first place, the existing system has many defects which must be remedied. In the second place, a somewhat new system must be developed which can utilize the data of the modern science of criminology.

The existing procedure must be reformed because many trials are prolonged far beyond a reasonable length, which is greatly to the inconvenience of the persons involved, and causes much expense to the state. There is reason to believe that some guilty persons escape punishment owing to unnecessary technicalities in the procedure. Such a condition of affairs is sure to stimulate an increase of crime, and it has undoubtedly done so to a certain extent in this country.

A simplification of the existing procedure is needed. Its present complexity is due largely to the effort to protect the accused, which is justifiable up to a certain point, because it is of the utmost importance that no innocent person shall be convicted. But when carried beyond this point it becomes a shield and cloak for guilty persons, under which cloak some of the guilty will escape punishment. This has happened in numerous

cases where a conviction has been reversed because of the omission of a word in an indictment or a similar unimportant error. These miscarriages of justice have caused a lack of confidence in the courts, have increased the amount of crime, and have encouraged the rise of lynch law. In order to avoid such miscarriages of justice the forms for the indictment and the information should be made as brief and simple as possible, so as to reduce the possibility of technical errors to a minimum. This has already been accomplished in England, and has increased materially the effectiveness of the criminal law in that country.

Furthermore, the prosecution of crime would be much simpler if most of the felonious offenses were prosecuted by means of an information prepared by a prosecuting officer instead of an indictment. Thus would be swept away the cumbersome method of indicting by grand jury. In fact, this reform has already been effected in several states, and should be adopted by all. It may appear as if the abolition of the grand jury removes an important protection for the innocent. But sufficient protection will remain. In the first place, in every case there should be a preliminary examination by an examining magistrate. In the second place, if the case is very weak, the prosecuting officer will be almost certain to dismiss rather than take the chances of defeat in a trial.

The grand jury has been regarded with much veneration in the past. But the examinations made by it are so brief and superficial that it is doubtful if it has ever been efficient in performing the function of selecting the cases to be tried. This work can be achieved quite as efficiently and much more promptly by examining magistrates and prosecuting officers. The abolition of the grand jury would hasten procedure, because the necessity of waiting for an examination by the grand jury has frequently resulted in long delays in bringing cases to trial.

In the English common law the accused was not required to testify. This feature of the law was supposed to be for the benefit of the accused, because if he did not testify he could not incriminate himself. Recently the accused has testified if he chose to do so, but has had the right to refuse, and the law has provided that such refusal should not have any weight with the jury and the judge. It is evident that the testimony of the ac-

cused has much value in every case, and in the interests of justice it should be introduced. So that the accused should be required to testify, or, at any rate, if permitted to refuse, such refusal should have weight with the jury and the judge. It is doubtful if this change would remove any justifiable protection from the accused, for if he is innocent his testimony should help rather than injure his cause, while if he is guilty there is no reason why he should not incriminate himself.

In the common law there developed for the protection of the accused the presumption of innocence. On the European Continent there has never been any presumption either of innocence or of guilt. The common law presumption of innocence has strengthened too much the position of the accused, and has made it too difficult to convict the guilty. This presumption should be abolished, at least in so far as it influences procedure, from the theory of the law.

The right of appeal is greatly abused in this country. A large percentage of criminal as well as of civil cases are appealed, and many of them are reversed upon purely technical grounds which do not affect the merits of the case. Many of these appeals are on errors in rulings on rules of order which should not ordinarily be reviewable, because they do not usually affect the substantial points at issue. But in most jurisdictions the rules of procedure, based largely upon previous decisions, are of such a nature that any of these rulings may be reviewed, and in many cases they furnish a basis for a reversal. Already in a few jurisdictions the rules of procedure have been so changed, or appellate courts have made such decisions, that this is no longer possible, and the same should become true over the whole country. In England there was no criminal court of appeal until 1907, and even now appeal is not a matter of right, but can be made only when the trial court thinks that the merits of the case are involved.

These criticisms indicate some of the desirable reforms in the existing procedure. But these reforms will not develop a procedure which can make use of scientific data. These facts may be applied in gathering evidence, testing the accuracy of testimony, measuring the penal responsibility of the accused, etc. The most important reforms in criminal procedure are those which will make possible the utilization of these scientific facts.

After a conviction has resulted from a trial it becomes necessary to decide upon the penal treatment to be inflicted upon the criminal. Under the old system of fixed penalties this was an easy thing for the judge to do. But the present tendency is towards the individualization of punishment, that is to say, towards adjusting the penal treatment to the character of the criminal. The judges should, therefore, be well acquainted with the nature of criminals. This requires a knowledge of the different types of criminals and of the social causes of crime which can be acquired only by means of special study.

Furthermore, the decision of the judge as to the penal treatment to be inflicted would in many cases be tentative. For example, if an indeterminate sentence was imposed, it would have to be decided later when this sentence is to terminate. At present this is done by prison officials. But it would probably be desirable that the judges also should participate in these decisions, thus bringing the courts and the penal institutions into coöperation in deciding these questions. It might be possible to establish a system of the periodic revision of sentences by the judges, so that each judge could revize from time to time the sentence of each person sentenced by him, so as to decide when the sentence should be terminated or whether the penal treatment should be changed in its character. These revisions of sentences would be made upon the advice and with the cooperation of the prison officials. If such a system of the periodic revision of sentences were introduced, the function of criminal procedure would be extended through the judge beyond the time of the conviction and original sentence to the end of the penal treatment of the criminal.

CHAPTER XVIII

THE SCIENTIFIC PRINCIPLES OF EVIDENCE

Superstitious methods of securing proof: the wager; the ordeal; torture — The English law of evidence — Medical jurisprudence: the evils of contradictory medical testimony; the training of medico-legal experts — Expert testimony — Abolition of the coroner's office — The oath — The psychological examination of witnesses: the causes of erroneous testimony; the psychological expert — The scientific stage of evidence.

THE object of a criminal trial is to gather, examine, and weigh evidence. Consequently, the larger part of the mechanism of criminal procedure is devoted to this work, and the subject of central importance in the study of the rules of procedure is evidence.

SUPERSTITIOUS METHODS OF SECURING PROOF

Various methods of securing and judging evidence have been used in the past. For example, the aid of spiritual beings has frequently been invoked to furnish proof of guilt or innocence. Among these religious methods are the wager of law, the wager of battle, and the ordeal. In the wager of law the proof was secured by means of compurgation. If the requisite number of compurgators or conjurators swore that they believed the accused on his oath, his plea of innocence was accepted as true. So that the wager of law was primarily a test of the reputation of the accused among his friends and neighbors. But the solemnity of the oath in which the deity was invoked gave to this method a religious character. The oath is still used as a test of truthfulness.

The wager of battle was applied by means of a judicial battle sanctioned and witnessed by the court. This battle took place between the accuser and the accused, or between their representatives, and God was supposed to give the victory to the side which was in the right.

The ordeal was the superstitious and religious method *par*

excellence of securing evidence and proof. If the accused was innocent, the deity was supposed to bring him successfully through the ordeal. If the accused was guilty, the deity was supposed to make him fail in the ordeal. Thus in the ordeal by water if the accused was thrown into water and sank and drowned, in some places it was regarded as proof that he was guilty, for otherwise God would have saved him. If he floated and survived, it was positive proof that the divine power was saving an innocent person. On the other hand, in other places sinking was regarded as proof of innocence, and floating as proof of guilt. The ordeal was inflicted by many means, such as boiling water, red-hot iron, fire, cold water, the cross, the *corsnaed* (consecrated bread or cheese), the eucharist, poison, the bier-right (the body of the victim bleeds on the approach of the murderer), by lot, etc.[1]

The use of torture was developed to a high degree in the ecclesiastical courts, especially under the Inquisition. Then it was, unfortunately, adopted to a certain extent by the secular courts. In the ecclesiastical courts torture had religious significance. In the secular courts it had little if any religious significance, but was used because it furnished what was supposed to be absolute proof of guilt through the confession of the accused. Torture has been abolished by law in all civilized countries, but it is still used illegally sometimes, as in the "third degree" methods of the police.

The English Law of Evidence

The law of evidence was developed more fully in the English procedure than in other systems of procedure. This was due to the fact that the English jury was originally a body of witnesses who gradually became judges of fact. Inasmuch as jurors are comparatively ignorant of law and procedure, and are inexperienced in hearing and judging evidence, the judges found it necessary to regulate the kinds of evidence to be presented before the jury, and also to instruct the jurors to a certain extent as to the manner in which they were to judge this evidence. In other

[1] For descriptions of all of these religious and superstitious methods of securing evidence and proof, see, H. C. Lea, *Superstition and Force, Essays on the wager of law, the wager of battle, the ordeal, torture*, 3d ed., Philadelphia, 1878.

words, it was necessary for the judges to protect the jury as much as possible against the mistakes due to its ignorance and inexperience.

In this fashion there evolved a body of more or less uniform rules of evidence. As the independence of the judges increased, these rules became more and more authoritative, until they were as binding as the common or statute law. There is, therefore, an intimate connection between the English law of evidence and the jury. The comparatively undeveloped state of the law of evidence in the European Continental procedure is easily accounted for by the absence of the jury on the Continent until after the French Revolution.

Evidence is classified in several different ways in the English law of evidence. Perhaps the most important classification is that of *direct* evidence, and *indirect*, *inferential*, or *circumstantial* evidence. Direct evidence is derived from actual observation, or the testimony of persons who have a knowledge derived from actual observation. Indirect evidence is derived by inference from other facts which have been actually observed, or are established by testimony. Indirect or circumstantial evidence is admissible, and may be as conclusive as direct evidence, but the tendency is to rate circumstantial evidence as having less weight than direct evidence.

Evidence is also classified as consisting of *material* or of *relevant* facts. A material fact is one which, when proved, decides one of the questions in the issue to be considered and adjudicated by the jury. A relevant fact is one from which, when proved, a material fact may be legally inferred. Facts which are neither material nor relevant are excluded from the consideration of the jury, and evidence concerning them is inadmissible.

Facts judicially noticed are certain facts which are presumed by the law to be personally known to the judge and jury. These are classified as political, legal and official facts, public history, natural history, and the vernacular language. The courts take judicial notice of these facts, and regard them as established without further proof.

Evidence is classified with respect to its form as *written* and *oral*. Written evidence consists of public and judicial records, deeds, bonds, etc. It is admissible whenever the fact in question is the existence of the document itself, or whenever the

contents of the document are legally sufficient to establish a material or relevant fact. Oral evidence consists of the *viva voce* testimony of a witness who has taken the oath. It is admissible only when the witness can testify from personal knowledge as to the existence or non-existence of a material or relevant fact, or when he is called to give expert testimony.

Evidence with respect to a written document is classified as *primary* and *secondary*. The document itself is primary evidence of its existence and contents. Copies and oral evidence with regard to it are secondary evidence, and secondary evidence is inadmissible whenever primary evidence can be produced.

A witness is not allowed to testify to statements made to him or in his presence by other persons. There are a few exceptions to this rule which there is not the space to state here. The exclusion of *hearsay* evidence is a distinctive feature of the English law of evidence.

No evidence against the character of the accused can be given, except in reply to favorable evidence as to his character which has already been introduced.

The voluntary confession of the accused, when made without fear or hope of favor, is admissible as evidence against him.

Any person who understands and recognizes the obligations of an oath is a *competent* witness, unless disqualified by circumstances specified by law. In the past those who had been convicted of certain infamous crimes, and those who had an interest in the case were disqualified, but at the present time these circumstances are regarded as affecting the credibility rather than the competency of a witness.

The *admissibility* of evidence is to be decided by the judge according to the law of evidence, or, when the law does not specify, according to his own discretion.

The *sufficiency* and *weight* of evidence are usually decided by the jury. From certain classes of facts, however, the law conclusively infers the existence or non-existence of other facts, and the jury is therefore compelled to accept this inference with respect to the latter facts whenever the former facts have been proved. From certain other classes of facts the law infers, but not conclusively, the existence or non-existence of other facts, and the jury is compelled to accept this inference with respect

to the latter facts only when the former facts have been proved, and when the inference, which the law usually derives therefrom, has not been rebutted. These inferences are called *presumptions* of the law.

The presumption of the law that the accused is innocent until proved to be guilty has a good deal of significance for the English law of evidence. It results in the principle that guilt must be proved beyond a reasonable doubt, and that the evidence must be of such a nature as to exclude every reasonable hypothesis but guilt. Furthermore, the *corpus delicti* (the body of the offense or the essence of the crime) must be established by evidence other than the extra-judicial admissions of the accused.

Leading questions, suggesting the desired answer to the witness, may be employed only in the cross-examination.

The *burden of proof* rests on the affirmative side, which may be the prosecution or the defense according to the nature of the issue.

When a *specific intent* is alleged in the indictment, it must be proved as laid.

Formerly the accused could not testify. But for some time past it has been permitted in American procedure, and the English "Criminal Evidence Act" of 1898 made it possible in English courts. If, however, the accused offers his testimony, the opposing side has the privilege of asking questions regarding his conduct and character which could not otherwise be asked.

These rules of evidence are characterized by a certain amount of arbitrariness and rigidity which are in some measure inevitable in any law of evidence. The presence of the jury has emphasized these traits in the English law of evidence.[1] But

[1] A well-known writer on this subject has characterized the English law of evidence as follows: "The characteristic features of the English common law system of judicial evidence, like those of every other system, are essentially connected with the constitution of the tribunal by which it is administered, and may be stated as consisting of three great principles: 1. The admissibility of evidence is matter of *law*, but the weight or value of evidence is matter of *fact*. 2. Matters of law, including the admissibility of evidence, are proper to be determined by a *fixed*, matters of fact by a *casual*, tribunal; but this is a principle which found little favour with the Court of Chancery, and has gradually become a less integral part of the whole English system. 3. In determining the admissibility of evidence, the production of the best evidence should be exacted." (W. M. Best, *The Principles of the Law of Evidence*, London, 1906, 10th ed., p. 66.)

inasmuch as each criminal case and each individual witness is more or less peculiar, the law of evidence should be as flexible as possible. In order to attain this flexibility it must be based as far as possible upon scientific principles.

Medical Jurisprudence

Scientific methods have already been applied to a certain extent in medical jurisprudence and in the use of expert testimony. Medical jurisprudence uses testimony from medico-legal experts. Information about the human body is frequently needed. It is necessary to examine cadavers, and victims of attacks against the person, such as wounds by firearms or other weapons, strangulation, precipitation from an elevation, asphyxiation, poisoning, rape, etc. Closely connected with this sort of testimony is evidence from observers with the microscope who examine traces of blood or of sperm, excrements, hairs, imprints of hands or of feet, etc.

Another important function of medico-legal experts is to examine accused persons, and to give testimony with regard to certain diseases, such as epilepsy, insanity, etc., which may cause irresponsibility. The importance of having medical testimony in such cases can hardly be questioned, since no judge or jury can be expected to have any special knowledge of these diseases. The practical questions, therefore, are as to how a medico-legal expert is to testify, and what influence his testimony is to have upon the decision.

A medico-legal expert is usually required to answer yes or no to the question as to whether or not the accused is insane, in spite of the fact that an absolute distinction cannot be drawn between insanity or sanity any more than it can be drawn between a disease of any part of the body and a healthy condition of that part. There are degrees in the extent to which the mind can be diseased, and a variety of ways in which it may be diseased. So that it is essential that the medico-legal expert should be free to diagnose the condition of the accused as he would any other case, and not be forced to give a categorical answer.

Closely connected with this form of answer has been the question of penal responsibility. A categorical answer to this question has been required because upon this answer has usually

depended the decision of the judge or jury as to the responsibility of the accused. But this practise reveals a simple and naïve conception of responsibility which fails to recognize that penal responsibility should vary not only according to the degree and nature of the disease, but also according to psychological and social considerations. So that the medico-legal expert, while testifying about a purely medical matter, is also deciding a question which is in part psychological and social.

The reply to the first question, as to how a medico-legal expert is to testify, is that he should be permitted to diagnose the condition of the accused, as he would diagnose any other case. The reply to the second question, as to the influence his testimony is to have upon the decision, is not so simple. Even though his testimony is purely medical, it frequently has an influence upon the decision of a question which is partly psychological and social, and this obviously is wrong.

At the present time the question as to whether or not a person accused of crime is insane is frequently decided by a judge or jury. This is manifestly absurd, since a judge or jury can have no special knowledge of insanity or any other disease. The question as to whether a defendant is diseased, and if so as to the nature and degree of his disease, whether it be insanity, epilepsy, etc., should be left entirely to an expert, or to a commission or jury of experts.

But while the medico-legal expert should have the power of deciding what is the pathological condition of the defendant, it is not necessary that he should make the final decision in any case. Psychological and social considerations also must be taken into account, as well as medical considerations. While the medico-legal expert should have the function of proving the medical facts, these facts should be weighed and judged in their relation to the other pertinent facts by a judge who has had anthropological, psychological, and sociological training.

The usual custom at present is for each side to summon medico-legal experts. It goes without saying that these experts are expected to search only for the truth, and to give unbiased testimony. But it is natural and almost inevitable that an expert should be influenced by the side which has called him, since he desires to please that side in order to be called again and earn the fees. When, therefore, there is any doubt, it is easy for

the expert to decide for his own side. Consequently, a public prosecutor will keep on hand experts who will always or nearly always testify against insanity. These experts are, therefore, prosecutors like the public prosecutor himself.

This contradictory system of expert testimony is probably due to the fact that experts do not always agree. It has, therefore, been considered necessary to have a number of expert opinions presented, and then to have the decision as to the question submitted to the experts made by another authority. But even though experts who know something about the question at issue do not always agree, and sometimes make mistakes; there is no reason for leaving the decision to lawyers and jurors who know nothing about the question involved. The decision of these medical questions should be left entirely to the medico-legal expert. His rôle should be an impartial one, namely, the function of examining the medical facts and judging them like a judge. Hence to make expert testimony contradictory is to make the judgment contradictory, which is a contradiction in terms.

Several methods of choosing experts under the existing system of procedure may be suggested which would make the experts non-partizan. Inasmuch as the functions of experts are like those of judges, they might be chosen like jurors from a list prepared beforehand, the right of challenging being given to both sides. Or the two sides could choose from this list in concurrence. When a specialist not on the list is needed, he could be designated by the judge, while each side would have the right to challenge.

But better still would be an organized system of medical jurisprudence. Such a system has already been partially developed in Germany. In each province there is a college of experts to which appeal can be made from the decision of an expert at a court of first instance. At the capital there is a scientific deputation which acts as a court of final appeal. In order to establish a system of medical jurisprudence there should be one or more professional experts attached to each court. There should be courts of appeal made up of the ablest experts. Then if there is a difference of opinion among the experts, or the decision in a case is contested, the question at issue can be referred to this court of appeal for decision.

A corps of professional experts is needed for a system of medical jurisprudence. At present the medico-legal experts usually are physicians without any special training. Some of the mistakes they make are due to the fact that legal medicine is not yet highly developed. But many of their mistakes are due to a lack of specialized knowledge. This knowledge would save them from errors of omission due to failure to take note of certain phenomena, and from errors of commission in misinterpreting the significance of other phenomena. In order to develop a corps of professional experts it will be necessary to make the profession of medico-legal expert a regular career with a remuneration sufficiently large to attract able medical students. These students would specialize in the courses in legal medicine given in the medical schools. Special courses in legal medicine are already being given in the medical schools at Lyons and Paris in France, at Lausanne in Switzerland, and elsewhere in Europe. It is possible that in course of time schools of legal medicine will be established.

In addition to this training in the schools there should be clinics in prisons, insane asylums, and morgues. Medico-legal laboratories should be established in connection with the courts of appeal or in other central places where evidence could be examined and analyzed, where students could obtain clinical experience, and where experiments could be carried on. Medico-legal data should be accumulated and preserved in museums in connection with these laboratories. Rules for the examination of cases should be established, and forms for keeping the records of cases uniformly should be devized. By all of these means the science of legal medicine would be developed very rapidly.

Expert Testimony

So far I have been discussing medical jurisprudence alone. But everything which has been said applies to all forms of scientific evidence and of expert testimony. For example, there is great need for the application of psychological and psychiatrical knowledge in criminal cases. A corps of trained psychologists and psychiatrists should be developed to furnish this knowledge in the same manner as the medico-legal experts, and to decide all technical questions as to amentia, insanity, neuroses, mental

responsibility, etc. In fact, many of the functions now being performed by the medico-legal experts should be transferred to the psychologists and psychiatrists.

Expert testimony is given by chemists, physicists, pharmacists, mineralogists, zoölogists, botanists, etc. It is given with regard to firearms, handwriting, photography, etc. Expert testimony can sometimes be furnished by an ignorant and simple-minded person about a subject which is not a matter of general knowledge. In fact, it would be impossible to enumerate all of the subjects about which expert testimony may be required. Almost any conceivable subject might at some time or other become involved in a question at issue in a criminal court.

Scientific evidence and expert testimony can be used not only to aid in ascertaining the facts as to whether a crime has been committed and as to who has committed it, but also to aid in sentencing the convicted criminal. Anatomical, physiological, psychological, and sociological evidence may be used to aid in deciding wisely as to the best sort of penal treatment for each criminal, thus making possible a scientific system of the individualization of punishment. Much of this evidence can be furnished by the medico-legal, the psychological, and the psychiatrical experts.

Expert testimony will always be a superior source of information at the disposal of justice, a means of securing scientific evidence of which more and more use should be made. Judges are not competent to decide technical questions. But while a judge cannot be expected to have all of this technical knowledge, he should have enough general knowledge to know when expert testimony should be used. Courses should, therefore, be given in law schools acquainting those who may become judges with the general nature of expert testimony, and with the occasions on which such testimony is needed.

Abolition of the Coroner's Office

When a system of medical jurisprudence has been established it will be easy to abolish the coroner's office. This institution for examining into the causes of violent and suspicious deaths originated in England. In many of the states the coroner is elected. Frequently he is neither lawyer nor physician, not-

withstanding the fact that he has legal functions to perform, and has to judge medical questions.[1] The coroner's examination becomes all the more absurd when a lay jury is summoned to assist in the examination, for the jurors are even less competent to judge the evidence placed before them than the coroner. So that the work of the coroner is usually grotesquely inadequate and erroneous, even when he is aided by medical assistants.

About forty years ago the coroner's office was abolished in Massachusetts, and a board of medical examiners was appointed to make the examinations previously made by the coroner. It is evident that these examinations should be made by competent medical authorities, and that their decisions upon these medical matters should be final. The legal functions of the coroners should be transferred to the criminal courts in which will be tried those accused of causing the deaths investigated by the medical examiners. In this fashion the rights of the accused will be adequately safeguarded.

The medico-legal experts in the system of medical jurisprudence described above would be competent to make these examinations. Furthermore, the medico-legal laboratories and museums would aid greatly in this work, while the records of the autopsies made by the experts would furnish valuable data to legal medicine.

The Oath

But most of the evidence in a criminal trial will ordinarily be furnished by witnesses who are neither scientists nor experts, but who have chanced to observe events and circumstances connected with the question at issue. Science may, however, be applied in testing the veracity of this testimony. The

[1] In the course of an investigation of the coroner's office in New York City made in 1914 by the Commissioner of Accounts it was found that there had been sixty-five coroners since the consolidation of the city of whom nineteen were physicians, eight were undertakers, seven were politicians, six were real estate dealers, two were saloon-keepers, two were plumbers, etc. The report of this investigation recommended the abolition of the coroner's office and the appointment of a board of medical examiners. (Commissioner L. M. Wallstein, *Report on Special Examination of the Accounts and Methods of the Office of Coroner in the City of New York*, 1915.) These recommendations were adopted in legislation which went into effect on January 1, 1918.

standards according to which the value of testimony has been judged have usually been very naïve. The oath has generally been regarded as a sufficient guarantee of the veracity of testimony. It is true that the oath may furnish some indication of the intention of the witness to tell the truth, but it obviously cannot confer in the slightest degree the ability to tell the truth. A judge cannot safely be assured that the witness is veracious if he has no other evidence than the oath of the truth of the testimony of the witness.

The oath is useless for truthful witnesses because they will endeavor to tell the truth anyway. It is ineffective for untruthful witnesses, unless religious superstition scares them into an attempt to tell the truth. The compulsory oath is incompatible with liberty of conscience and of religious belief. This is sometimes recognized by the law, as, for example, in the Swiss constitution which states that no one shall be forced to perform a religious act, and that therefore no one shall be forced to take an oath. To require an oath of the accused that he is innocent is especially absurd and unjustifiable. The canonical law in creating the inquisitorial procedure in the thirteenth century submitted the accused to the oath, and this custom was introduced into the law of almost all of Europe, the principal exception being England. The oath in this case necessitates the perjury of the guilty accused if he proposes to stand trial for his crime.

The oath may, therefore, secure a certain amount of subjective truth in the sense of increasing the intention of the witness to tell the truth, but little if any objective truth in the sense of increasing the degree of concurrence of his testimony with the facts. That is to say, by the threat of punishment which its religious character implies the oath may remove the intention to hide the truth, but this does not necessarily increase the capacity for telling the truth. The ancient Romans apparently regarded the oath as guaranteeing subjective truth only, for Mommsen tells us that in the Roman criminal procedure witnesses swore to what they thought they had seen or heard, and not to what they knew. In other words, it was an oath of good faith.

The oath may help a little to secure objective truth by impressing upon witnesses the solemnity of the occasion, and thus

increasing their attentiveness. But attentiveness alone cannot do much to strengthen the memory, so that the utility of the oath for securing objective truth is slight indeed. If then the oath is to be used at all, its greatest efficacy will be in securing subjective truth from religious persons who are so untruthful as to give false testimony knowingly, if not prevented by the threat of punishment implied in the oath. For the irreligious the oath is not only useless but unjust, because it is an imposition upon their freedom of belief and action, and in its place should be substituted a simple affirmation of intention to tell the truth.

The Psychological Examination of Witnesses

During the last few decades experimental psychology has been greatly developed. Much study has been devoted to the reliability of memory. It is evident that when the witness intends to tell the truth the accuracy of testimony will depend upon the memory, and that the causes of erroneous testimony are to be found in defects of the memory.

The primary cause of error may be an abnormal condition of the sensory organs. These organs may be congenitally unable to convey correct impressions of occurrences external to the body. Or they may be incapacitated by nervous diseases such as epilepsy, hysteria, neurasthenia, psychasthenia, cerebral syphilis, alcoholism, drug habits, etc. Or they may be incapacitated by a temporary condition, such as a wound in the head or a momentary state of emotional excitement. But even if the sensory organs convey accurate impressions of these external occurrences, these impressions may become distorted by reactions within the brain. The judgment may misconstrue these sensory impressions. The influence of age, sex, occupation, beliefs, etc., must be noted in this connection. Each impression upon reaching the brain awakens memories of past impressions. These impressions combine with each other, and lapses in the recollection of one impression may be filled by memories of other impressions, thus rendering these memories more or less inaccurate. The memory may also be modified by means of suggestions from the outside. These are some of the causes which make the memory unreliable.

Witnesses may be classified according to sex and age, or according to their peculiarities in giving testimony. In some respects young children are good witnesses, since they have comparatively few beliefs or prejudices to bias their testimony. But their imagination lacks restraint, and they possess a weak sense of responsibility. They are usually very suggestible, and lie for different motives or for no reason whatever. They lack an exact notion of time, and have few abstract ideas. The young boy is ordinarily a better witness than the young girl, because he observes more carefully. The young girl is not so good a witness, because she stays at home and sees little of the world. She has too vivid an imagination, and frequently gives false testimony for the sake of excitement. On the other hand, adults observe carefully what they notice, but their attention is determined largely by their interests, and their observations tend to become colored by their beliefs and prejudices.

Witnesses may be classified according to their desire to tell the truth. Those who do not intend to tell the truth can frequently be discovered by means of psychological methods, and the truth forced from them in spite of themselves. But even those who desire to tell the truth frequently fail to do so for the reasons which have been stated. These include many types ranging from the pathological, such as the insane, the paranoiac, the hysterical, etc., to the normal or nearly normal who give false testimony unwittingly on account of errors of the memory to which any normal person is liable.

These psychological facts can be used in practical jurisprudence in a psychiatric and psychological examination of the witness which will reveal his mental traits. In the first part of such an examination it would be ascertained whether or not a witness is pathological, that is to say, whether or not his sensory organs are in a diseased condition, or if he is lacking in capacity to fix the attention, or in ability to reproduce what he has seen. But this examination should be carried far enough to ascertain the normal mental peculiarities of the witness. For example, by means of a comparatively simple test it can be ascertained whether the memory of the witness is of the visual, the auditory, or the tactile type. This fact is of great significance in estimating the value of his testimony about a particular occurrence.

It has been suggested that by means of such an examination

can be determined the "constants of certitude" of a witness, that is to say, the degree of accuracy to be expected of him, and that the value of his testimony can be estimated according to this constant number. It is doubtful, however, if this would be wise, since the value of a person's testimony varies according to the occurrence about which he is testifying. Furthermore, such an examination would probably not be necessary for every witness. It would be necessary when the testimony was about a complicated situation, and where the testimony was contradictory. It should always be given to a witness whose testimony is decisive, especially when there is contradictory testimony on essential points. It should be given whenever there is reason to believe that a witness is lying, or is not telling as much as he knows. By an analysis of the association of ideas in the mind of the witness much can be learned as to whether he has been lying, and as to the true contents of his memory.

The use of spontaneous and suggested testimony should be governed by the mental traits of the witness. As a general rule, spontaneous testimony is much more accurate than suggested testimony, though not so detailed. Consequently, suggestive questions should ordinarily be avoided, especially when the witness has a strong imagination. But sometimes in the case of a laconic witness who has no interest in the affair it becomes necessary to ask suggestive questions in order to draw out his testimony. These questions should be carefully framed in order to avoid influencing the character of the testimony. The suggestive power of the press should always be taken into account whenever it has influence upon the testimony of a witness.

In order to make these examinations it would be necessary to have a psychological expert attached to every criminal court. The medico-legal expert could in many cases be given the training which would fit him to perform these functions. In an office adjoining the courtroom he could, whenever necessary, quickly apply the tests which would determine the mental peculiarities of a witness.

Furthermore, all those who take part in conducting a judicial examination or trial, such as judges, prosecutors, counsel for the defense, etc., should have some acquaintance with these psychological facts and principles. This would enable them to estimate more accurately the value of testimony. They would

then know under what circumstances a witness should be sent to the psychological expert for an examination.

The above discussion shows the practical significance of psychological facts and principles for the presentation and judging of legal evidence. Up to the present time evidence has been judged by empirical rules and principles, which frequently have been wrong. The application of these scientific principles would make possible a much higher degree of certitude as to the veracity and accuracy of testimony.

Furthermore, the psychological examination could take the place of the vulgar and frequently brutal ordeals of the "third degree." This method is frequently used by the police to extort confessions and other kinds of desired testimony. It sometimes brings to light genuine facts, but almost invariably does so in an illegal and brutal fashion. It frequently gives rise to false testimony which may furnish the basis for a miscarriage of justice. The psychological method is infinitely superior, because it is quicker, far more reliable, and is just and humane.

Heretofore it has been the theory of the law that the testimony of one witness is as good in quality as the testimony of any other witness. But this theory has never been consistently applied in practise, because judges, whether professional or lay, have always given more weight to the testimony of some witnesses than to the testimony of other witnesses. Psychology shows us that there are great differences in the reliability of witnesses. But the judges have discriminated according to purely empirical principles, and not according to scientific principles. The judges should, therefore, become acquainted with these scientific principles.

In similar fashion scientific principles should be applied in the analysis of the results of the physiological and sociological examinations. On the basis of these examinations should be decided what penal treatment is to be given to those who are found guilty of crimes.

When these reforms in the presentation of evidence have been accomplished, the scientific stage of evidence will have been attained, Evidence will then be gathered and its value estimated according to scientific principles based on expert knowledge derived from experiments and from facts which have been systematically collected and studied.

CHAPTER XIX

PUBLIC DEFENSE IN CRIMINAL TRIALS

The injustice of private defense — Public defense and the reform of criminal procedure — Abolition of the plea of guilty — Significance of public defense for a scientific criminal procedure: the individualization of punishment; the education and selection of prosecutors, defenders, and judges — Public defense and the contradictory debate — Free civil justice.

It is an axiom of the law that a person charged with crime is presumed to be innocent until found guilty; and yet society does all it can to convict him, but almost nothing to secure for him an adequate defense. In a criminal trial the prosecution is conducted by a public prosecutor, employed by the state; but the defendant at the bar is forced to provide for his own defense. He, a single individual, must defend himself against the state, representing many individuals. If he has money at his command, all may be well with him. If he has no money, his plight is a pitiable one indeed.

It is true that the public prosecutor is charged in theory with the conservation of the interests of the defendant, as well as with the duty of prosecuting him. But it is a notorious fact that in practise the public prosecutor is almost invariably bent on securing a conviction, regardless of the interests of the defendant. It is true also that when the defendant is unable to employ counsel, the court will assign counsel for the defense. But ordinarily the defense furnished by an assigned counsel is little better than a farce. Consequently, it is evident that the present system of *public* prosecution coupled with *private* defense in our criminal procedure does not maintain the balance between social and individual rights, and puts rich and poor upon a very unequal standing before the law.

The Injustice of Private Defense

In the pure form of the procedure of accusation both prosecution and defense were private. Then gradually through the

influence of the procedure of investigation, prosecution became public, but the defense has remained private. In England, as late as 1836, no person prosecuted for any felony, except treason, had even the right to employ counsel. The helplessness of the defendant in the face of an organized prosecution carried on by trained prosecutors was so evident that in the English courts the judges began to watch over the interests of the accused, and became to a certain extent counsel for the defense.[1]

The palpable injustice of this system led, in the first half of the nineteenth century, to the extension of this privilege of securing counsel to all those prosecuted for crime, and for matters of fact as well as questions of law. So that if the defendant has the means to employ counsel as able as the counsel employed by the prosecution, he is likely to obtain justice in the trial. If, however, a defendant is poor, as is frequently the case, he is unable to procure the assistance of counsel, so that this system is unjust to the poor defendant.

When a defendant is unable to employ counsel, it becomes the duty of the judge to assign a lawyer practising in his court to take charge of the defense. As a general rule, this lawyer is young and comparatively inexperienced, and receives no compensation from the court for performing this service. The usual result is that the lawyer endeavors to ascertain the financial resources of the defendant in order to determine whether there is any

[1] Sir William Blackstone, writing in the latter part of the eighteenth century, comments upon this situation as follows:

"It is a settled rule at common law, that no counsel shall be allowed a prisoner upon his trial, upon the general issue in any capital crime, unless some point of law shall arise, proper to be debated. A rule, which (however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner; that is, shall see that the proceedings against him are legal and strictly regular) seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law. And the judges themselves are so sensible of this defect that they never scruple to allow a prisoner counsel to instruct him what questions to ask, or even to ask questions for him, with respect to matters of fact; for as to matters of law arising on the trial, they are *entitled* to the assistance of counsel." (*Commentaries*, Book IV, Chap. 25.)

It is obviously most unwise to put the judge in a partizan position by encouraging him to take the side either of the prosecution or of the defense. And yet this is likely to happen when one of the two sides in a trial is much weaker than the other side.

possibility of securing a fee. If there is no such possibility, his desire is to dispose of the case with as little trouble as possible. Under such conditions the defense will inevitably be inadequate.

It even happens sometimes that the assigned counsel will try, first of all, to persuade the defendant to plead guilty, regardless of whether or not he is guilty. If the counsel succeeds, he is relieved from the burden of expending time and effort in defending the case. The defendant may, however, protest his innocence and insist upon a trial. The lawyer will then give to the preparation of the case as little time as possible. The defendant receives a weak and inadequate defense in opposition to the carefully prepared prosecution of the public prosecutor. This is grossly unjust to the defendant who is so unfortunate as to be unable to employ counsel, and such defendants sometimes plead guilty rather than be tried with so inefficient a defense.[1]

In order to remove the evils which arise out of inefficient de-

[1] According to the reports of the *Court of General Sessions* in the County of New York, free counsel was assigned in that court to 331 poor defendants in 1906, and to 1,495 poor defendants in 1915. These figures indicate to a slight extent the large number of persons in this country to whom counsel is assigned.

Attempts have been made in the past in various countries to provide defense for poor defendants. The tribunes of ancient Rome were prepared to take the part of a defendant in a criminal case. (C. Lombroso, *Crime, Its Causes and Remedies*, Boston, 1911, pp. 327–328.) In Piedmont and in Naples there used to be an official called the "advocate of the poor" who acted as counsel in all pauper cases, and such an official still exists in the city of Alexandria in Piedmont. (E. Ferri, *Criminal Sociology*, Boston, 1917, p. 472.) It appears that a similar official called the "*pauperus procurator*" existed under the Papal government in Rome. (See Robert Browning, *The Ring and the Book*.) An advocate of the poor was provided at public expense in Spain in the fifteenth century. (Prescott, *History of Ferdinand and Isabella*, Vol. I, p. 194.) A similar official still exists in Spain, in the Argentine Republic, and in Mexico. Free legal defense is provided to poor defendants through the bar associations in France (M. Parmelee, *The Principles of Anthropology and Sociology in Their Relations to Criminal Procedure*, New York, 1908, p. 276), and in Scotland. (E. R. Keedy, *Criminal Procedure in Scotland*, in the *Jour. Crim. Law*, Vol. III, No. 5, Jan., 1913, pp. 738–9.)

Other cases might be cited, but, so far as I can discover, up to the present day there has been no thoroughgoing system of public defense in criminal trials in any country. When the state has paid for defending poor prisoners the defense has naturally been more efficient than when such legal assistance has been gratuitous.

fense for poor defendants, it is necessary to take the next step, which is also the final one, in the historical evolution which has been raising the efficiency of the defense to the level of the efficiency of the prosecution. This step is the establishment of a system of public defense, which would, I believe, be the most important reform in the existing system of procedure, and would, furthermore, be of the greatest significance for the development of a new system of criminal procedure based upon the data and inductions of the modern science of criminology.[1]

The present system of procedure can be improved in several respects by the introduction of public defense. In the first place, it is evident that the standing of rich and poor before the law would be equalized, for the poor would then have as efficient a defense as the rich. But still more would be accomplished by this reform. Society now claims the right to prosecute, but does little or nothing to defend. And yet no one, not even a rich person, ought to be forced to provide for his own defense. Especially true is this of the innocent victims of public prosecution. They have suffered the humiliation of being prosecuted, have been forced to face the possibility of being convicted, and have lost time and money in being tried for crimes of which they are ultimately acquitted. For this suffering and loss they ought to be indemnified by the state, as is now being done in several countries.[2] The least that society can do for them is to provide

[1] Bills providing for a public defender have been introduced into the legislatures of several states during the past twenty years. (See the *Report of the Law Reform Committee* of the *Association of the Bar of the City of New York* on *The Necessity and Advisability of Creating the Office of Public Defender*, New York, 1915, pp. 2–3.) This measure has been advocated by the Socialist party in various countries.

But so far as the present writer has been able to discover, he was the first writer in this country, or, for that matter, in the world, to present a comprehensive statement of the case for public defense in criminal trials. (Maurice Parmelee, *Public Defense in Criminal Trials*, in the *International Socialist Review*, October, 1905; *The Principles of Anthropology and Sociology in Their Relations to Criminal Procedure*, New York, 1908, Chapter VIII; *Public Defense in Criminal Trials*, in the *Proceedings of the Kansas State Conference of Charities and Correction*, 1909; *Public Defense in Criminal Trials*, in the *Jour. Crim. Law*, Vol. I, No. 5, January, 1911.)

Furthermore, the present writer is the only one up to the present time who has pointed out the significance of public defense in criminal trials for a system of criminal procedure based upon scientific principles.

[2] See Chapter XXI.

them with adequate defense. And yet they are left entirely to their own resources to secure this defense. If they lack sufficient resources to secure adequate defense, they are given the existing form of official defense, which, as I have shown, is in the main a failure.

Public Defense and the Reform of Criminal Procedure

Public defense will, in all probability, prevent most of the exploitation of sensational cases caused by both prosecuting attorneys and counsel for the defense who are endeavoring to advertize themselves rather than to secure a speedy administration of public justice. By means of such exploitation an unhealthy public interest in crime is stimulated, and the administration of justice is diverted from its important social function.

The introduction of public defense will inevitably meet opposition from some members of the bar. But the bar associations, which are constantly striving to raise the standard of the legal profession, should favor this reform, because it will tend to purify the profession by eliminating the disreputable lawyer. Furthermore, many positions as public defenders would be created which would go to the better class of lawyers, and a certain amount of the better kind of criminal practise might still remain. Public defense would not necessarily destroy private criminal practise at once. Defendants might still retain the privilege of employing private counsel when they so desire. It is impossible to determine at present whether it would ever be well for the public defender to allow a case to go entirely out of his hands. It might be well for him to have supervision in every case, and in course of time he would probably be given complete control of every criminal case. But for a time, at any rate, private counsel would coöperate with him in defending cases. Thus public defense would leave a large field for honorable and dignified practise either as a public defender or as a private counselor.

Public defense will destroy much of the opposition now made by some lawyers to the reform of criminal procedure. This opposition grows in large part out of the fear that these reforms will limit their field of practise. Inasmuch as public defense would realize this fear, they would no longer have much in-

terest in opposing other reforms. Thus one great obstacle in the way of the reform of criminal procedure would be removed.

The principal effect of public defense as a reform of the present system of criminal procedure will be to render much less likely the conviction of innocent persons. It may be asserted, however, that it will also result in the acquittal of more guilty persons. If this were true, it would be a serious objection to public defense, for criminal procedure should not become any less effective in securing the conviction of the guilty. But this criticism is not true, because, in the first place, public defense would make public prosecution no less effective. In the second place, in many trials at the present time professional criminals employ counsel more able than the public prosecutor, thus greatly increasing the chances for their acquittal. If public defense was made the rule, so that defendants in criminal cases could not employ private counsel, the defense would be on an equality with the prosecution with respect to ability, so that professional criminals would be unable to secure an acquittal by employing counsel superior to the prosecution.

Public defense would eliminate almost entirely the many disreputable lawyers in criminal practise. The existence of these so-called "shyster" lawyers is favored on the one hand by professional criminals, who need the services of unscrupulous counsel, and on the other hand by poor and ignorant defendants, whose precarious situation makes them the easy prey of these lawyers. Under a system of public defense, however, all the cases of professional criminals and of these poor and ignorant defendants would be in the hands of the public defender, so that the field of activity for the disreputable lawyer would be destroyed. Public defense would, therefore, tend to purify the legal profession.

The public defender could do much more effective work than the probation officer. This officer exists in certain of the courts in states where probation or parole laws have been enacted. Part of his work is to prevent some of the abuses which have been described. As a general rule he can have nothing to do with a criminal case until the defendant has been convicted or has pleaded guilty. He is then directed by the judge to investigate the case. Having gathered as much information as possible, he reports to the judge. He may also make a recom-

mendation as to the best method of disposing of the case. Where the prisoner appears to have been convicted unjustly, or where leniency seems desirable, he recommends leniency. He may thus prevent to a slight extent some of these abuses. But he is narrowly limited in his powers and opportunities. His work is performed in a more or less haphazard and incidental manner, and his success depends largely upon the judges under whom he happens to be working. He is usually unable to influence a case until after the greatest injury has been inflicted, and is then able to alleviate only to a slight degree the effects of the injury.

The public defender, on the contrary, would have charge of a case from the outset and could prevent all of the abuses which have been described. The conviction of innocent persons due to inefficient defense by lawyers appointed by the judge would no longer be possible. The work of investigating the past record of prisoners about to be sentenced, now done by probation officers, could be done as well or better by the public defender. In most cases he would already have made this investigation while conducting the trial. The public defender would thus become to a large extent the logical successor of the probation officer.

Some of the principal evils in the administration of the law today arise out of long delay in bringing cases to trial. These delays in criminal cases are frequently caused by the public prosecutor, who is looking for evidence of guilt. The public defender would in the meantime be searching for evidence of innocence, and would demand a trial as soon as he had obtained his evidence. Delay in bringing a case to trial is a great injustice to the defendant, especially if he is unable to give bail and is forced to wait in prison. The public defender, by securing proof of innocence, could in many cases prevent this delay.

Abolition of the Plea of Guilty

Public defense in criminal trials would make it much more feasible to dispense with the present method of allowing defendants to plead guilty. The plea of guilty does not exist in European Continental systems of procedure,[1] and has given

[1] Oliver E. Bodington, *An Outline of the French Law of Evidence*, London, 1904.

rise to several grave abuses in Anglo-American procedure. The plea of guilty is permitted in order to expedite the business of the court. A defendant in a criminal trial is brought before the court and asked whether he wishes to plead guilty. Many defendants, owing to ignorance of court procedure, or, in the case of immigrants, of the English language, are incapable of understanding this question. It sometimes happens that one of these ignorant defendants, who is not represented by counsel, will answer affirmatively to this question. He will plead guilty unwittingly, and frequently without intending to plead guilty. This grave miscarriage of justice can happen because the defendant does not have adequate representation in court, a contingency which would never arise under a system of public defense. In other cases poor and ignorant defendants are intimidated into pleading guilty because of the lack of adequate means of defending themselves.

On the other hand, experienced criminals when charged with crime frequently take advantage of this opportunity to plead guilty. They will plead guilty with the utmost alacrity in order to secure as a reward the benefit of the leniency ordinarily displayed under these circumstances by the law, the public prosecutors, and the judges. It often happens that a first offender who has stood trial and has been convicted will receive a longer sentence than an old offender who has pleaded guilty to the same crime. Such grotesque mistakes as these would rarely happen if a trial were held in each case. In the course of the trial the past record of each defendant would be exposed, and it would be possible to judge according to the character and past record of the criminal. Public defense would make it much more feasible to have a trial in every case, because the public defender would be ready to prepare carefully the defense in each case, and would be able to guarantee to each defendant a fair trial.

The plea of guilty in our existing system of criminal procedure tempts a public prosecutor to urge a defendant to plead guilty in order to save himself the time and trouble of prosecuting the case. He may threaten with unusually severe punishment the defendant who insists upon a trial. He may offer to allow the defendant to plead guilty to a crime less serious than the one with which he is charged. Or the prosecutor may offer to

ask the judge for leniency if the defendant will plead guilty. As a result poor and ignorant defendants are frequently frightened or coerced into pleading guilty. No defendant should be made to feel that he is jeopardizing his interests by insisting upon a trial. The public defender could shield the innocent defendant from the threats of the public prosecutor.

It will be contended that the abolition of the plea of guilty from our procedure will increase greatly, and to a considerable extent unnecessarily, the work of our criminal courts. But this increase will after all be comparatively small, because the statement of the defendant that he is guilty will be taken as testimony, as in European Continental procedure. This testimony will ordinarily be accepted as conclusive evidence of guilt, and will, therefore, greatly shorten and simplify the trial.

In some cases, however, the trial would prove that this testimony is not true. Insanity or a delusion will sometimes make a defendant think himself guilty when he is innocent. In other cases a defendant will for a hidden motive testify that he is guilty when he knows that he is innocent. Men have been known to plead guilty to crimes of which they were innocent in order to shield the reputation of women whom they loved. In most of these cases a trial would reveal the falsity of this testimony, and would prevent the punishment of an innocent person, while in all cases a trial would furnish a better basis for the individualization of penal treatment by revealing more fully the character and past record of the criminal.

Significance of Public Defense for a Scientific Criminal Procedure

But public defense is also of the utmost significance for the development of a new system of criminal procedure in which public defense will not only safeguard the innocent from conviction, but will also materially influence the treatment of the convicted. One of the fundamental principles of this new procedure will be the individualization of punishment. In order to individualize penal treatment wisely it is necessary that those who conduct criminal procedure shall be able to estimate at their true value the facts which are accumulated with regard to

the persons who are tried and convicted. It is, therefore, absolutely essential that the prosecutor and defender who accumulate and present the evidence shall recognize the facts which are significant, and shall present them intelligently, thus making the trial a basis for individualization.

In order to accomplish this end the prosecutors and defenders should be trained in criminal anthropology and sociology, psychiatry, and penology. So long as private defense exists, it will be impossible to require this training of the defenders, for under a system of private defense it is possible to retain any lawyer for the defense, even one who usually practises in the civil courts. But under a system of public defense it would be possible to give both prosecutors and defenders a thorough training. This training would begin with the study of the sciences mentioned above, in addition to the usual legal training, by those who wish to fit themselves for criminal practise. In a number of European Continental law schools such courses have already been introduced for those who expect to specialize in criminal practise. If public defense existed, it would be possible to make these courses obligatory. The theoretical study in the law school would be supplemented by practical study, first in connection with the police, where the student would become acquainted with the methods of pursuing the criminal, and would assist in the work of gathering and classifying evidence. Next the student would spend a period of time in the prisons in the study of penological methods and of the criminals themselves.

After this clinical study he would be prepared to enter criminal practise either as a public prosecutor or as a public defender. It would probably be advisable, in order to avoid any bias whatsoever against the defendant, that the young advocate's first duties should be as a defender. But a period of service as defender should be followed by a similar period of service as prosecutor, and this alternation between the two offices should be continued. This interchange between the personnel of the prosecution and of the defense would give a wide experience to all of the members of the criminal bar, and would avert the bias which now tends to develop either for or against the defendant through exclusive work either for the defense or for the prosecution.

But this special training for criminal practise, which would be made feasible by the introduction of public defense, is of the utmost importance for still another reason. From the ranks of the public prosecutors and defenders should be recruited the judges for the criminal bench. These judges would be much better prepared to perform their important social functions than the members of the criminal bench of today. The study of law and of social science would enable them to appreciate much better the relation between society and the criminal, and to understand the significance of crime in the social economy. The study of the scientific methods of gathering evidence, the psychology of testimony, the law of evidence, and the technical rules of procedure would render them much more competent to judge as to the commission of crime. The study of the biological, psychological, and social causes of crime and the scientific methods of penal treatment would enable them to prescribe treatment for the criminal much more wisely. This preliminary theoretical education would be supplemented by an extensive and varied practical experience in connection with the police, in the prisons, and in the different branches of criminal procedure.

These judges would be able to gather many scientific facts whose significance the judges of today are not even capable of recognizing. These facts will have great value in developing the science of criminology, and in increasing its applications to procedure. Upon the decisions of these judges will be based a system of jurisprudence which, though it can never be as precise in an arbitrary manner as a jurisprudence based entirely upon a penal code, will nevertheless be more scientific than an arbitrary penal code, and will therefore increase the wisdom and certainty of decisions as time goes by.

Under the new system of criminal procedure which would grow out of public defense it would no longer be feasible to elect to office public prosecutors and criminal judges, as is customary today. In the olden days when the power of kings and of the aristocratic class was still great, the election of judges was a valuable guarantee of popular rights. But in our modern democracies such a guarantee is no longer necessary. If the criminal bar and bench is to become a special profession, it is essential that the tenure of office should be more or less per-

manent. Sufficient control over this profession could be exercized in most cases by a board of discipline composed of high executive, legislative, and judicial officials. Inasmuch as it would represent all branches of the government, such a board would be impartial when exercizing its power over the judiciary. Public impeachment could be used as a control in extreme cases.

Hence it is that public defense would make possible the development of a new system of criminal procedure in which the criminal bar and bench would receive special training, and would be appointed to office according to a merit system. In this new system the largest possible use would be made of the data and inductions of criminological science, thus making the trial a much better basis for the individualization of punishment.

Public Defense and the Contradictory Debate

An apparently serious objection which is raised against public defense is that if both prosecution and defense are to be conducted by public officials, the opposition between the two sides might as well be abolished, and the trial be conducted by one group of officials representing the state who will judge impartially. To many persons it seems anomalous that the state should prosecute and defend at the same time. But this apparent inconsistency does not in reality exist. On the contrary it has been amply demonstrated in this book that the functions of criminal procedure are social. Consequently, both prosecution and defense are social functions, and in the long run represent the same social interests. So that there is no contradiction of interests between public prosecution and public defense.

I have already shown that the procedure of investigation was based upon the principle of social defense against crime, and that the trial in this type of procedure was supposed to be an impartial examination. Later for practical reasons the contradictory feature of the procedure of accusation was introduced into a procedure based upon a principle similar to that of the procedure of investigation. The partizan trial has practical utility because it is useful for the presentation and exposition of evidence, and for arriving at a decision. It is hardly possible for a single mind to go over all of the facts in a case and arrive at a definite conclusion when these facts are complex and are not

sufficiently complete to afford scientific accuracy, as is often the case in criminal trials.[1] It is, therefore, necessary to have the evidence on each side presented in as striking a manner as possible to the unbiased minds of the judge and jury, in order that they may weigh the evidence quickly and come to a decision. By making the opposing sides in the partizan trial equal in ability, as would be the case with public prosecution and public defense, the tendency of advocates to be prejudiced would be neutralized.

However, if a better method of presenting evidence and of arriving at a decision than the partizan trial is devized, it may become possible to abolish the partizan trial and prosecution and defense from criminal procedure. The trial of today is still too much of a forensic duel in which the principal question is as to who will win. The true functions of a trial are to reveal evidence and to arrive at a practical conclusion. To perform these functions well it is necessary to strengthen those elements in our criminal courts which desire primarily the investigation of truth, and not those which are interested solely in winning a case. Public defense will tend in this direction by lessening a counsel's personal interest in one side of a case, by averting the development through habit of a bias on one side, and by increasing by means of special training a counsel's ability to recognize what is significant and true in the evidence. Eventually public defense may lead to the abolition of the contradictory debate from criminal procedure.

Within the last few years public defenders have been appointed in several places in this country.[2] But nowhere as yet, in this country or elsewhere in the world, has there been established a system of public defense such as has been outlined in the

[1] *Cf.* E. Ferri, *Criminal Sociology*, Boston, 1917, p. 472.

[2] Public defenders were appointed in Oklahoma in 1912, in Los Angeles, Cal., in 1914, in Portland, Ore., in 1915, in Omaha, Neb., in 1915, in Pittsburg, Penn., in 1915, in Columbus, Ohio, in 1915, etc. (See the *Report of the Law Reform Committee* of the *Association of the Bar of the City of New York* on *The Necessity and Advisability of Creating the Office of Public Defender*, New York, 1915, pp. 4–10; M. C. Goldman, *The Public Defender*, New York, 1917, pp. 81–84.)

Free defense for poor defendants is furnished by many philanthropic organizations and private individuals, while in a number of cities so-called "voluntary" public defenders have been appointed.

preceding pages. The forms of public defense now in existence bear only a remote resemblance to the system of public defense which I have described. It will doubtless be impossible to introduce a thoroughgoing system of public defense until criminological principles are much more widely known than is the case at present.

Free Civil Justice

The logical sequel to public defense is free civil justice; that is to say, the employment of attorneys by the public for the pleading and defense of civil cases. There is no more equality before the law for rich and poor in the civil courts than there is in the criminal courts, because a decision in favor of the plaintiff or the defendant in a civil suit, however much in the right he may be, depends largely upon his ability to secure efficient counsel. There will not be justice for all until both criminal and civil procedure are made free.

It will be contended that free civil justice would stimulate an excessive amount of litigation. This will probably be the case at first, but measures can and will be devized to prevent unnecessary litigation by imposing penalties upon the losing side in civil suits, as, for example, the payment of costs, whenever the court decides that the plaintiff did not have adequate reason for bringing suit, or was not prompted by a genuine sense of justice in doing so. In the long run, free civil justice would probably cause less work for the courts than the present system, because much time would be saved which is now wasted by private counsel over technicalities in order to increase the size of their fees. Furthermore, free civil justice would prevent a certain amount of crime which is now caused by the lack of financial resources for the bringing of civil suits, and by the slow administration of justice in the civil courts. It sometimes happens that a person who is unable to seek justice through the courts, or who has been foiled in the attempt to secure it in a legal manner, will resort to criminal methods for the purpose of securing this justice.

It will also be contended that public defense and free civil justice will require a large expenditure on the part of the state. In all probability the state will be more than recompensed in

the long run for this expenditure by the diminution in the amount of crime and other forms of social friction which will result from free criminal and civil justice. But in any case this expenditure is fully justified as a means of bringing about an equalization of justice for rich and poor and of socializing criminal and civil procedure. Justice is a fundamental human right, and there are few if any functions of a state which are more important than that of securing justice for its citizens.

CHAPTER XX

THE JUDICIAL FUNCTION

The English jury — The characteristics of jurors — Criticisms of the jury — The functions of the judge — The training and appointment of judges — The control of the judiciary.

THE jury is a very ancient institution. Under the Mosaic law the elders performed this judicial function. In ancient Athens this function was performed by the *Heliastes*. The Roman jury of *judices jurati* had jurisdiction only in civil cases. Among the Teutonic tribes the citizens had the power of judging. The feudal jury was composed of the peers of the accused. So that the custom of deciding legal cases by means of a body of men other than professional judges who are sworn to judge the evidence has been widespread in the past.

THE ENGLISH JURY

The type of jury now in use developed in England. It is difficult to ascertain the origin of the English jury. One theory is that it came from the ancient Scandinavian jury through the Danish jury. Another theory is that it came from the judicial assemblies of the Saxons. But wherever it may have originated, it was much influenced in its development by a form of jury introduced into England at the time of the Norman conquest from the procedure of inquiry in the ancient French law known as the *inquisitio*. In this procedure the judge summoned a number of citizens, not definitely fixed, worthy of confidence and acquainted with the facts, and after administering the oath to them asked them for their opinion.

Henry II, Duke of Normandy, made the *inquisitio* an organic part of the Norman law, so that under certain conditions it could be demanded in any criminal case. When Henry went to the throne of England as its conqueror, this method of proof was introduced as the *recognitio d'assisa*. It extended at first

only to questions of property (*magna assisa*) and of possession (*parva assisa*).

At first the jurors in the English jury were merely witnesses whose duty it was to testify from personal knowledge, and sometimes to offer an opinion. Later they acquired the power to judge as well as to testify, and in course of time ceased to be witnesses.

The jury of denunciation appears to have been established by Henry II about the year 1164 A. D. (Constitution of Clarendon, 10 Hen. II), though it is possible that it had existed previously among the Saxons. This form of jury later became a jury of accusation, now known as the grand jury. The coroner's jury, which was established originally to investigate shipwrecks, treasure-trove, etc., acquired the functions of investigating violent deaths, and of making accusations when it saw fit. Up to the reign of Edward III the same persons could constitute the jury of accusation and the jury of judgment, but since that time this has become impossible.

From England the jury was carried to America, where it is used among Anglo-Saxon peoples almost if not quite as extensively as in England. The English jury did not go to the European Continent until the time of the French Revolution. The use of torture as a mode of proof was abolished at that time, and the introduction of the jury was in harmony with the democratic spirit of the times. From France the jury spread to most of the countries of Europe.

As I have already stated in Chapter XVIII, the coroner's jury is being replaced by medico-legal experts. The grand jury also is rapidly being superseded in its functions of examination by the examining magistrate, who can do this work much more efficiently. In several of the American States a grand jury is summoned only for exceptional cases, as when political corruption has been widespread. We shall therefore devote all of our attention to the jury of judgment, or petit jury.

The Characteristics of Jurors

The jury is based upon certain principles which have been gradually formulated in the course of its history, and which are always used as arguments in its favor. The jury is regarded

as the "bulwark" or "advance guard" of liberty, because it is supposed to protect the rights and liberties of the people against encroachments by the central power. It represents public opinion, and keeps the professional judges and the courts in touch with the public conscience. It is a school of citizenship. It is entirely independent, and is therefore not responsible to the central authorities. Its naïve conscience, unsophisticated in the law, furnishes the best method of judging evidence. Its moral judgment serves as a corrective for the laws. A consideration of the salient traits of the jury will indicate the value of these arguments in its favor.

The machinery by means of which jurors are chosen varies more or less from place to place. It is, however, almost invariably the custom to exclude manual and day laborers. Many professional men, also, such as doctors, teachers, lawyers, clergymen, etc., are excluded, as well as many persons in the upper classes. So that the tendency is to exclude the lowest and the upper classes. The standard of intelligence of the jury is, therefore, at best mediocre.

It is difficult for most jurors to perform jury service. It is not easy for a merchant or farmer to leave his work, and the fees are not usually sufficient to pay for the loss of time. For this reason many jurors endeavor to be excused at the beginning of their term of service. Sometimes, indeed, a juror will induce a lawyer to challenge him in order to be relieved from serving on a jury. On the other hand, certain jurors are anxious to serve, some of them in order to acquire a reputation in their neighborhood, others of them in order to secure the fees. The latter ordinarily belong to a low type of juror.

The jurors are usually inspired by a sincere desire to do their duty, provided they are not disturbed by external influences. A juror ordinarily feels the responsibility of his position, and is desirous of filling it well. When he sees the accused before him, a humanitarian feeling leads him to want to do justice.

But jurors are greatly hampered by their ignorance. They are ignorant, as a rule, of legal procedure and documents. Experience is necessary to be able to separate significant from insignificant details in the evidence, and this experience most jurors lack. Furthermore, jurors know little or nothing about crime and criminals. They have not even the empirical knowl-

edge that professional judges and lawyers acquire, to say nothing of a knowledge of criminology.

This ignorance will frequently disquiet a juror, and he will go in search of information. But little information is to be had. In England books of instruction to jurors are published which a juror may read, and in France a vague printed statement is given to jurors which furnishes little enlightenment. Consequently, most of the information of a juror is of a haphazard sort, much of it coming sometimes from a court attendant. This ignorance tends to develop a suspicious attitude on the part of the juror towards all those concerned in the trial, towards the judge whose exalted position puts a barrier between the juror who is a judge of circumstance and the judge of profession, towards the lawyers on account of their partizan position, etc.

Many influences act upon a juror in the course of a trial. Perhaps the principal influence is that exerted by the lawyers. On account of the ignorance of jurors a skillful lawyer can frequently deceive them as to the true significance of evidence. Consequently, cases are often determined by the respective ability of the opposing lawyers to accomplish this deception, and not upon the merits of the case. Owing to the influence which counsel have over jurors, they will indulge in much oratory and claptrap in every trial in which there is a jury, thus lowering greatly the intellectual standard of the trial.

The judge has a good deal of influence over the jurors. The jury is influenced by its general impression of the judge. If it is pleased with the judge, it will usually do what it thinks will please him. But if it loses confidence in the judge on account of a mistake made by him, or if it is displeased with his personality, it will oppose him as much as possible, owing to its distrust or dislike.

In England the jury has much confidence in the judge, and the summing up of the judge is likely to influence the jury greatly. In France and elsewhere on the European Continent the summing up by the judge has been abolished, because it was believed that it influenced the jury too much. This was probably due to the tendency of the Continental judge to be partial to the prosecution. But the Continental judge is sometimes able to influence the jury in another way. In Continental procedure the jury may call the presiding judge to its council chamber

in order to consult with him and to ask his advice. Under these circumstances the judge is able frequently, if he wishes, to influence the jury considerably. This is manifestly wrong, and if the judge is to meet the jury at all it should be in the presence of the plaintiff, defendant, and counsel for the defendant.

The jurors may be greatly influenced by the appearance and personality of the defendant or plaintiff. For example, in the trial of a crime of passion the jury may be moved by the personality of the defendant. On the other hand, in the trial of a crime against the person the sympathies of the jury may go out to the victim of the crime on account of the suffering and injury which his or her appearance manifests. The influence of the personality of the accused over the jury has led the jury to individualize punishment to a certain extent, though this individualization has in many cases not been on a rational basis.

The press and the public sentiment of the moment have much influence over the jury. Local prejudices influence the jury greatly in its decisions. For example, in a certain community the jury will always be more than usually severe upon one crime because it is peculiarly obnoxious to that community, while towards another crime it may be unusually lenient.

The trade or profession of a juror is likely to influence him in his decisions by giving him a peculiar point of view. The juror may have heard of a theory of criminality which he will attempt to apply in an unthinking manner. He may regard the criminal as the result of heredity, as the fault of society, or as morally free and therefore entirely responsible for his acts, and, consequently, be guided in his decision by a unilateral theory.

A fundamental trait of the juror is his lack of a power of attention. Not being accustomed to follow the proceedings of a court, many jurors after the first few minutes fall into a semi-conscious state of revery in which they hear little of the evidence or arguments. Consequently, the important points do not become impressed upon their minds, especially in a long trial. Power of attention to legal matters can be developed only through training and attention. It is a noticeable fact that old judges, owing to their longer experience, usually have at the end of a trial a fresher attention than young judges.

Cases may be classified according to their relative influence

upon the jury into those in which the crime has the most influence, and those in which the accused has the most influence. An illustration of the first type would be a larceny or forgery coming before a jury composed largely or wholly of merchants, who would be severe on this kind of crime. An example of the second type would be a criminal of passion whose personality would appeal strongly to the jury. In the latter case the jury would tend to individualize, but not so in the former case.

Criticisms of the Jury

The contradictory debate varies in different countries according to the nature of the people. In France the tendency is to appeal to the passions. In England the tendency is towards excessive casuistry. But everywhere an oratorical character is given to the debate, and much sentimental claptrap is introduced because sentiment predominates over reason in the jury. The result is that the debate tends to confuse the jury as to the main points at issue by obscuring them.

After the debate comes the summing up or charge to the jury of the judge, in which he states the juridical aspects of the questions at stake and reviews the main features of the evidence. A sober presentation of these facts by the judge has, as a rule, a beneficial effect upon the jury, though this summing up has been abolished in France and elsewhere on the European Continent on account of the danger of the judge being partial to the prosecution.

After the charge from the judge the jury retires to deliberate, unless they are able to make a decision immediately. The tendency is for the jury to break up at first into knots of two or three, discussing the questions at issue rather incoherently. Then, as the distinctly formulated opinions begin to appear, the discussion becomes more general with the exponents of these opinions dominating, the others remaining more or less silent. Sometimes, in accordance with the psychology of crowds, a single person dominates the remainder of the jury. This leader is not necessarily the most intelligent member of the jury, but has the most stubborn will by means of which he overbears the convictions of the others. He is assisted in accomplishing his purpose in England and America by the neces-

sity of arriving at a unanimous decision. On the European Continent only a majority is required, thus permitting of differences of opinion.

During their deliberations the jury may be influenced by the judge, especially on the European Continent where he meets the jury alone. The jurors are usually kept carefully secluded from the public during their deliberations, though in some European countries they are permitted to go out in the intervals of their deliberations. This is manifestly wrong, since it may result in bribery and other forms of corruption. The decision of a jury is final, since there is no way of appealing from it.

There is little guarantee of the incorruptibility of a jury, since the giving of a bribe can be detected with great difficulty. The juror can accept a bribe with little danger, since he is to return to private life very soon, and has no public reputation as a judge to sustain.

The jury is not always a safeguard of the people's rights and liberties against the encroachment of a despot or other central authority. On the contrary, history shows us that, owing to corruption and intimidation, the jury has often been weakest when the central power was most tyrannical. So that the jury cannot be regarded as a universal Palladium of liberty, as it is sometimes called.[1]

[1] Stephen, though an advocate of the jury system, has admitted its weakness in the face of tyrannical power: "They (juries) are also capable of being intimidated, as the experience of Ireland has abundantly shown. Intimidation has never been systematically practiced in England in modern times, but I believe it would be just as easy and just as effective here as it has been shown to be in Ireland. Under the Plantagenets, and down to the establishment of the court of Star Chamber trial by jury was so weak in England as to cause something like a general paralysis of the administration of justice. Under Charles II it was a blind and cruel system. Under part of the reign of George III it was, to say the least, quite as severe as the severest judge without a jury could ever have been. The Revolutionary tribunal during the Reign of Terror tried by a jury." (J. F. Stephen, *A History of the Criminal Law of England*, London, 1883, Vol. I, p. 569.)

The jury has failed to resist every kind of tyranny, even that of the people. "In England in the sixteenth and seventeenth centuries, in France during the Revolution and the Restoration, the jury has nearly always been the faithful servant of the most powerful; it has succumbed to all kinds of tyrannies, to that of the throne as well as that of the populace." (R. Garofalo, *La Criminologie*, Paris, 1905, p. 396.) See also T. W. Earle, *The Jury Laws and Their Amendment*, London, 1882, pp. 121–123.

The power of the jury to correct the law is in many ways a danger. One of the underlying principles of the jury is that its moral judgment acts as a corrective of the law. It is true that the jury has at times served a useful purpose by relieving the rigidity or arbitrariness of a law in its application, or by condemning a law by refusing to enforce it. An example of its utility for this purpose is the way in which the jury has stimulated the individualization of punishment.

But the question may be raised whether the reform of the law should belong to a judicial body, since the result is a confusion of legislative and judicial functions. By refusing to enforce a law the jury makes it a dead letter. This power of the jury tends to discourage the zeal of those who are trying to promote legislative reform. Furthermore, it encourages the transgression of the laws by lessening their value in the public esteem. It is true that there are some bad laws which are not worthy of enforcement. It is also true that in a day when the people had little or no legislative power, it may have been justifiable to give the jury legislative functions. But this is no longer necessary under the present democratic régime, and a better means of abolishing bad laws should be devized.

The present distinction between law and fact caused incoherence of action on the part of the jury. It is supposed to be a judge of facts alone. But it cannot avoid being influenced by the personality of the accused, and taking into consideration the penal consequences of its verdict, which is a matter of law. As its knowledge of the law is exceedingly vague, it cannot give an exact expression of its opinion in its verdict. Consequently, a jury will sometimes acquit in a case where it believes that the accused is guilty, but fears that the penal consequences of a verdict of guilty will be heavier than the accused deserves. The expedient of permitting the jury to designate extenuating circumstances which lessen the penalty was introduced into European Continental procedure largely for the purpose of preventing these acquittals.

The necessity of securing a unanimous decision in English and American courts frequently causes long delays and great uncertainty. A unanimous decision is required for the protec-

tion of the accused, in order that he shall not be condemned unless all of the twelve jurors have been persuaded of his guilt. But there are probably few cases in which the decision represents a real unanimity. In many cases the minority yields to the majority on account of the pressure brought to bear upon it to reach a decision. Even if the decision is not to be by a bare majority, as on the European Continent, it might be by eight or nine out of twelve. Already in some of the American States there is a tendency towards this reform, as where in criminal cases less grave than felonies only a three-fourths majority is required for conviction.

The number of jurors was hit upon by chance. As has already been noted, jurors were originally witnesses, and a considerable number of them were required at that time. A large number may also have been needed in the past in order to give the jurors courage. But there is no particular reason now why the jury should number twelve. A smaller number, as, for example, seven, would be much less expensive. It is probable also that the discussion in a smaller jury would be more coherent and logical than in a larger jury, because its members would come into closer touch with each other.

A system similar to the jury system is that in which a small number of citizens sit with the judge as lay assessors, and judge both fact and law. In France, where these assessors are called *échevins*, there are a few courts in which this system is used, and the same is true in several other European countries. This system is used most of all in Germany, where the assessors are known as *schöffen*.

The judge sits sometimes with two, sometimes with four, sometimes with as many as six of these assessors. Most of the less important crimes in Germany are tried in these courts. The lay assessor is more of a judge than the juror, because he judges questions of law as well as of fact. But the assessors are said to be more or less incompetent, and tend to acquit in the cases of crimes which they themselves are liable to commit. This is to be expected, since they are drawn from much the same classes as jurors. However, their decisions are on the whole better than those of a jury, because the judge presides over their deliberations. Furthermore, there is not so much delay in bringing cases to trial as there is before a jury.

The jury has been prohibited from judging questions of law because it is ignorant of the law. But to judge a question of fact is frequently more difficult than to judge a question of law, whether it be a question of evidence or of the guilt of a person. A judge in deciding a question of law has usually a limited number of solutions, and has precedents upon which to base his decision. A jury has no precedents and no system of jurisprudence upon which to base its decisions, and there are frequently several possible solutions. And yet it takes specialized knowledge to decide these questions of fact just as specialization is needed for deciding questions of law, and it is the principle of specialization that the jury violates.

I have already described the influence of the jury upon the English law of evidence. This law has been devized largely for the purpose of protecting the jury against being influenced by unimportant testimony. Many kinds of evidence are excluded, such as hearsay evidence, notwithstanding the fact that the hearsay evidence or opinion of a person of good intelligence and character may be worth more than the direct evidence of a stupid or untruthful person. In France hearsay evidence is usually judged by experienced judges who are capable of separating the wheat from the chaff, and who are not hampered by rules of evidence and case law. The English law of evidence, on the contrary, increases the complexity of the procedure, and frequently delays its action. Were it not for the jury the law of evidence could be much simpler and less rigid.

It is sometimes contended in behalf of the jury that there is a connection between the suffrage, or making the law, and serving on juries, or administering the law. It is said that under a democratic régime the people are able to watch over the administration of the laws by means of the jury. But a distinction should be made between electoral right and judicial function. The jury confuses legislative and judicial functions, and it is probably better to have the judicial functions performed by judges whose education and intelligence are above the average, because the judicial function requires specialized knowledge which is not necessary for the electoral right.

As a school of citizenship the jury disseminates a little legal knowledge among the public, but the gain in this direction is scarcely sufficient to pay for the expense and trouble it causes

the jurors. Furthermore, constant attempts at evasion do not make the jury the "best means of inculcating civic duty" in the average citizen. By codifying the law and by educational means a knowledge of the law can be disseminated. And if the jury results in a maladministration of justice, its utility for educating the public cannot be justified.

Perhaps the principal argument in favor of the jury is that it keeps the courts and justice in touch with the public. It keeps the professional judge informed as to the state of the public conscience, and it judges according to the prevailing standard of morality.[1] There may be a few practical reasons for keeping justice on a level with the prevailing moral standard, in order to keep the people in sympathy with the courts. But the administration of justice should also tend to raise the moral standard, and to accomplish this it should be superior, as far as is practicable, to the ideas and prejudices of the public.

The preceding considerations clearly indicate that the decisions of juries are more or less governed by chance. The jury system violates the principle of the division of labor, which is now applied in nearly every sphere of human activity, because it does not utilize specialized knowledge. Science can play no part in the deliberations of juries, only common sense and rarely ever good sense. And yet the use of scientific methods of judging evidence and guilt is imperative. This necessity is fatal to the jury system.

The jury has had an important political aspect in the past. It was one of the means by which the people exercized a power in the government, though frequently it was not so successful in defending the people's rights and liberties as is usually supposed. This made the jury a political as well as a judicial institution. But these political reasons for the existence of the jury have little importance under the present democratic régime, when the people have a large legislative power. The old axiom that a man should be tried by his peers has little meaning now that a

[1] "From their position in life its members are likely to know more of the parties and witnesses, and are consequently better able to enter into their views and motives; and from the novelty of their situation they bring a freshness and earnestness to the inquiry, which the constant habit of deciding, adjudicating and punishing dims and blunts more or less in the mind of every judge." (W. M. Best, *The Principles of the Law of Evidence*, London, 1906, 10th ed., p. 71.)

large measure of political equality exists. If this principle were rigidly applied criminals would be tried by criminals, children by children, etc.

Probably the sole political value of the jury today is for the trial of political crimes, and of press offenses which tend to become public and political in their character. It is true that in the past the jury has frequently been either servile or rebel in political cases. But this will probably become less frequent in the future, since tyrannical and despotic power is less likely to exist.

It is evident, therefore, that the jury will be abolished eventually in most criminal cases. This makes doubly important the subject of the character and training of the judges who are to take the place of the jury.

The Functions of the Judge

The judge holds the highest rank in the legal hierarchy. Judicial functions were originally performed by the chief of a tribe or the king. Later they were delegated by him to judges who frequently were priests. These judges had a judicial power equal to that of the king. At first they were not restricted by rules of procedure or penal codes.

In the two typical forms of procedure the judge has had somewhat dissimilar functions. In the procedure of accusation the judge was an arbiter between two private parties. In the procedure of investigation he was the representative of society whose duty it was to conserve social interests. When public prosecution was introduced into the systems of procedure based upon the procedure of accusation, the judge acted sometimes as counsel for the defense. This was true in English procedure until a comparatively recent date. But this function of the judge resulted from the temporary derangement of the balance between the two parties in a trial by the introduction of public prosecution. It is obvious that this is not a proper function for a judge, because it puts him in a partizan position.

The criminal bench of today may be divided into two classes, namely, the examining magistrates, and the judges who make the final decisions. In England and the United States the examining magistrate is also a police magistrate who has the power

of summary trial in some cases. But this power is incompatible with the most efficient examination on the part of the magistrate. He cannot be so open-minded and so active in his investigation if he knows that he must come to a final decision and must, therefore, be constantly weighing the evidence. The position of the French *juge d'instruction* is preferable in this respect, because his function is only to examine. His powers are probably too arbitrary and too extensive, but his facilities for making a careful examination are far superior to those of the Anglo-American examining magistrate.

The judge has exclusive powers of judging only the minor offenses in most of the civilized countries, because the graver crimes are usually tried by a jury. But in England the right of trial by jury is frequently waived by the accused in indictable offenses, and in these cases a summary trial by the judge is given. In Holland there has never been a jury. A great advantage of trial by a judge is the sobriety and calmness of the procedure, because the counsel omit the claptrap and oratory which they use before a jury. A visit to a Dutch court shows the marked difference between it and courts in countries where juries are used. The counsel are much quieter and more to the point in their arguments, and the judges are much more attentive and take many notes.

When a trial by jury is in progress the judge has the following functions to perform. He has supervision over the taking of evidence. In English and American courts the judge interprets and applies the law of evidence. In Continental procedure the presiding judge conducts the examination, and inasmuch as the law of evidence is very rudimentary he has a discretionary authority as to what evidence shall be admitted, etc. After the examination and contradictory debate in Anglo-American procedure comes the charge of the judge to the jury. In his summing up of the case the judge is expected to state the law connected with the case, and to review the evidence only in so far as is necessary for this statement of law. He is not supposed to express his opinion, but will frequently reveal it, and is likely to influence the jury thereby.

If the jury brings in a verdict of guilty, the judge pronounces the sentence. The power of the judge to decide the penalty has been increasing recently. On the European Continent the ex-

pedient of extenuating circumstances gives the judge a certain amount of latitude in fixing the penalty, and the indeterminate sentence does the same in the United States. The suspension of sentence and conditional release also increase the power of the judge. It has also been suggested that he should be given the power of pardoning, but this is scarcely necessary when he has the powers of suspending sentence and of conditional release.

The true functions of the judge are to estimate the value of evidence, and to prescribe the appropriate treatment. The last he should do only tentatively, but his power may be extended over the period of penal treatment itself by means of the periodic revision of sentences which will be discussed presently. In many respects the judges of today are not well fitted to perform these functions.

The Training and Appointment of Judges

The personnel of the criminal bench is composed almost invariably of lawyers with a purely legal training. Some of them are members also of the civil bench, where they do most of their work. As a result of his exclusively legal training the judge of today tends to regard the criminal as a juridical abstraction. Dominated as they are by purely legal standards, many judges oppose the introduction of the scientific standards of criminology. This has caused an antagonism of legal and scientific interests in criminal procedure. If the criminal bench could be separated entirely from the civil bench, the legal bias of the judges would not be so strong, and it would be more feasible to introduce scientific methods.

It is contended by some persons that the professional judge tends to see guilt in every accused person. The champions of the jury have made much of this criticism, and have undoubtedly carried it too far. It is true that a long experience in performing judicial functions and the condemnation of many criminals may develop in a judge the tendency to regard every defendant as guilty. But this is not necessarily the case, and it depends to a considerable extent upon the temperament of the judge. There are certain features of European Continental procedure which encourage this tendency in judges, as, for example,

reading the record of the preliminary examination before the trial, and conducting the examination during the trial, but these features can and should be changed. The publicity of a trial is a check upon the judge, because the public would quickly resent any grave partiality of the judge against the accused. The decision of a judge is rarely ever the final resort, and many guarantees of individual rights exist in the way of appeal, revision of sentences, etc., and these guarantees are increasing as punishment is becoming more individualized.

The training which would develop a scientific criminal magistracy has been suggested in the preceding chapter. There should be a special course in the law school for those who wish to prepare for this branch of the judiciary. In this course should be studied, in addition to the fundamental principles of law and the legal aspects of procedure; criminal anthropology, psychology, and sociology; and the psychology of testimony. In connection with this course should be held clinics in prisons, hospitals, insane asylums, and morgues.

Then should come some experience in gathering and examining evidence in connection with the police force. In this fashion would be acquired an acquaintance with police methods and the ability to estimate the value of evidence. A temporary residence in a penal institution would also be advisable, in order to study criminals at first hand and to become acquainted with penal methods. The student would now be prepared to take part in a trial as counsel. It would probably be preferable for him to commence as a public defender in order to avoid all possibility of ever becoming prejudiced against the accused. After some experience as a public defender he should become a public prosecutor, and then alternate between the two at more or less regular intervals. This alternation would prevent the judge from becoming biased on either side, and would develop his ability to judge the value of evidence, because he would have to view it from both sides.

From the ranks of the public prosecutors and public defenders would be recruited the judges for the criminal bench. These judges would be free from most of the faults of the judges of today, and would have the technical knowledge which the jury lacks. They would, therefore, be the logical substitutes for the jury.

Today when a judge has sentenced a criminal, he is able to dismiss him from his mind. Rarely ever does he have to revize his sentence, and then it is usually for a purely legal reason. So that the judge is not made to feel keenly the consequences of his sentences. And yet he should be fully aware of these consequences in order to increase his sense of responsibility. He should be acquainted with the effects of the sentences he imposes upon criminals. His sense of responsibility would be greatly increased if he were given the power of revizing sentences periodically, or at least a share in this power.

In this connection may be raised the question as to whether or not a single judge is preferable to a plurality of judges. It is asserted in behalf of the single judge that he feels entirely responsible for his acts, while a plurality of judges tends to destroy the feeling of responsibility of each judge. The single judge, therefore, uses greater care in his decisions, and is governed by a higher moral standard. For these reasons the single judge would probably be preferable in most cases. In some cases it might be advisable to have several judges each of whom would be a specialist in a branch of knowledge which contributes to making a wise decision in a complicated case. Such a board of judges would correspond to a jury of experts, and would give a consensus of opinion upon the case under examination like a consultation of doctors.

In this country recently there has been a tendency to encourage juvenile court judges to specialize in that field of judicial work. There are temperamental and other differences between judges which render some of them more adapted to juvenile court work than the others. But it is questionable if it would be desirable to develop a special type of juvenile court judge. It is probably advisable that the same judges try both juvenile and adult cases. Just as a physician, in order to understand the diseases of adults, needs to know something about the diseases of children and *vice versa*, so it is that a judge, in order to be able to judge juvenile criminals, must understand adult criminals and *vice versa*. In fact, it is doubtful if it is desirable to have any special types of judges. All judges should have a training sufficiently broad to enable them to judge wisely any type of crime and of criminal.

The conservation of the independence of the criminal bench

will become still more important when trial by jury has been abolished. In the lower grades of the juridical hierarchy in which the judge holds the highest rank the choice of men for positions would have to be by examination. But in the higher ranks an examination would not be an adequate test. In Europe judges are usually appointed for life by the government. The permanent tenure of office gives them a considerable amount of independence. But they are nevertheless under the influence of the executive power to a certain extent, because their advancement depends upon the executive. In the United States the tendency has been towards the election of judges. A serious objection to this method of choice is the temporary tenure of office, though this objection has been partly obviated by making the terms very long.

If the criminal magistracy is to become a special profession, it is absolutely essential that the tenure of office should be more or less permanent. Otherwise it will be impossible to induce suitable candidates to acquire the training for the profession. But if the choice of the judges is left to the more or less uncertain method of popular election, their tenure of office will be very precarious. It is, however, hard to determine by whom the choice is to be made, whether by the executive power or by the legislative power. The judiciary should not be too much under the influence of any one branch of the government. A method of choice will have to be developed which will safeguard the judiciary from domination by any other branch of the government. The higher judges will probably be appointed from the lower judicial ranks by the executive power with the consent of the legislature. The judges in the lower ranks can be chosen at least in part by the judges in the higher ranks.

The Control of the Judiciary

At the same time it is essential that the judiciary should be under an efficient control. It happens all too frequently at the present time that judges exceed their powers and violate the law. Furthermore, the criminal judges are much given to delivering moral homilies to convicted persons and others who appear before them which partake of the nature of *obiter dicta*. These utterances are usually colored by class and religious prej-

udices which render these utterances insulting to those towards whom they are directed and offensive to impartial observers. The autocratic position of the judge in his own courtroom inevitably tends to develop in him a pontifical manner and a feeling of infallibility which should be carefully checked. This is peculiarly true of the relatively untrained and comparatively incompetent judges who are chosen under our present system.

When the judges are adequately trained for their positions these evils will disappear in large part. The judges will then comprehend the causes of the criminality of those who are arraigned before them, and will no longer indulge in puerile and futile admonitions to goodness. But it will still be necessary to maintain checks upon the judiciary. The bench can be organized in such a fashion that it can furnish its own discipline to a considerable extent. The upper ranks of the judicial hierarchy can supervize the work of the lower ranks. Public impeachment could be used in extreme cases, and would serve as a control over the supreme judges. Impeachment could be exercized most effectively ordinarily by means of a board of discipline composed of high executive, legislative, and judicial officials. Inasmuch as such a disciplinary board would represent all branches of the government, it would be impartial when exercizing its power over the judiciary.

In this country recently some use has been made of the popular recall of judges and of judicial decisions to serve as a check upon the judiciary.[1] There can be no question that the judiciary has acquired an egregiously excessive power in this country.[2] The popular recall of judges and especially of judicial decisions doubtless are valuable democratic devices for restraining the courts from deciding important political and social questions and from judicial legislation by means of an abuse of the power of interpreting the law. But these abuses of judicial power take place almost exclusively in the civil courts. So that there is scarcely any need for the popular recall in the criminal courts, and it would be highly undesirable to subject the criminal magistracy and their decisions to the popular recall, because it would

[1] See, for example, J. D. Barnett, *The Operation of the Initiative, Referendum, and Recall in Oregon*, New York, 1915.

[2] See, for example, C. G. Haines, *The American Doctrine of Judicial Supremacy*, New York, 1914.

make their tenure of office precarious and criminal justice uncertain.

The gradual elimination of the jury and the increasing individualization in the treatment of the criminal will greatly enhance the importance of judicial functions. These facts indicate the supreme importance of an able and efficient criminal magistracy. In order to attract to it the men of the best ability, it will be necessary to offer adequate remuneration and permanency of employment. These will be guarantees also against the danger of bribery. The training outlined above will give them the necessary special knowledge. These judges will gather many scientific facts which the judges of today are incapable of comprehending. These facts will be of the utmost value in developing the science of criminology and increasing its applications to procedure. Upon the decisions of these judges will be based a system of jurisprudence which, though it can never be as exact as a jurisprudence based upon a penal code, will nevertheless increase the wisdom and certainty of decisions as time goes by.

CHAPTER XXI

THE POLICE FUNCTION

The police and the army — Police organization and administration: national and local police control; the rural police — The functions of the police — The training and selection of the police force — The integrity of the police — Evil influence of unenforceable laws against vice — Homicide in the United States — Arrest — Preliminary detention — Provisional liberation — Indemnification for mistaken detention and prosecution.

THE police power of the state is one of the most important functions of the executive branch of government. It enforces the dictates of the legislative and judicial branches of government, and, consequently, includes a great variety of powers. Among these are the repression of crime, the regulation of public morals, the maintenance of public order, the protection of the safety and health of the public, the control of the dependent classes; and the regulation of various economic conditions and activities, such as the protection of debtors, the protection of laborers, the prevention of fraud, the regulation of combinations of labor and of capital, the control of corporations, etc.[1]

The police function of the state has been performed in various ways in the past. The army has usually taken an important part in enforcing the law. Private citizens have frequently been forced to take turns in serving on watch duty, and to assist in capturing criminals as members of a *posse comitatus*.[2] But within the past century or two regular police bodies have come into being in all civilized countries, which have usually evolved out of the army.

The police power is the strong arm of the state by means of which it ordinarily enforces its laws. In time of war and under

[1] *Cf.* E. Freund, *The Police Power*, Chicago, 1904.

[2] In Saxon England prevailed the "frankpledge" system, according to which the members of each tithing, or group of ten, were responsible for any offense committed by one of its members. See W. A. Morris, *The Frankpledge System*, New York, 1910; W. L. M. Lee, *A History of Police in England*, London, 1901.

martial law the military power may supersede it. But in civilized countries it is the customary means of enforcing the will of the state. There could be little repression of crime without an organized police force, for without such an organization all of the repressing would have to be done by private citizens, most of whom are unprepared and unfitted for such work. As a matter of fact, criminals have been rampant in the past,[1] and are so usually today in frontier and barbarous communities. In our frontier communities it has usually been found necessary to organize vigilance committees to repress criminals and maintain order until a police force could be organized. Even in our civilized communities the direct social cost of criminal activities in persons killed and injured and property stolen and destroyed is very great.[2]

Police Organization and Administration

The manner in which the police has been organized in each country has depended somewhat upon the nature of the government. In the countries where the government is highly centralized the police is usually controlled by the central government, so that the local communities have little to say with regard to the police protection which they receive. This is invariably the case in autocratically and oligarchically governed countries, where the police constitutes a powerful weapon in the hands of the monarch or ruling class. Germany and Russia [3] are two countries in which the control of the police is highly centralized, and is frequently used as a means of oppression.

In the countries where the government is more or less decentralized, which are invariably democratically governed, the police is ordinarily controlled by the local communities. The two principal examples of this type of police administration are England and the United States.

[1] See, L. O. Pike, *A History of Crime in England*, 2 vols., London, 1873–6.

[2] See, for a discussion of the aggregate amount stolen by professional criminals in this country, J. Flynt, *The World of Graft*, New York, 1901, pp. 148–190.

See, for an estimate of the cost of penal repression in the State of Massachusetts, W. F. Spalding, *The Money Cost of Crime*, in the *Jour. Crim. Law*, Vol. I, No. 1, May, 1910, pp. 86–102.

[3] The above statement was written previous to the Russian Revolution of 1917 which has lessened materially the power of the police in Russia.

It goes without saying that in so far as centralized police control leads to the use of the police power for autocratic and oligarchic ends, and to the violation of fundamental human rights and liberties, it is to be condemned.[1] Furthermore, even when a country is democratically governed, though the government is highly centralized, as in France, local police control is better in some respects, since each community can judge best for itself its own needs.

On the other hand, there are some advantages in centralized police control, provided it is not used for purposes of oppression. A national police administration can in many respects be more efficient in the repression of crime. Many criminals travel around a good deal, and a national police can keep track of them and check their activities more effectively than local police bodies. Furthermore, a national police organization can keep in closer touch with similar organizations in other countries, thus making more effective the international repression of crime. It is also asserted sometimes that the police should be controlled by the central government, because many of the laws to be enforced have been promulgated by the central government. This

[1] A careful observer has characterized the autocratically controlled German police in the following terms: —

"The autocratic spirit of the German government is reflected in the imperviousness of the police to public opinion. The police department is a specialized institution in the details of which the people are held to have no proper interest. Not only are police records withheld from public scrutiny, but in the state-controlled forces no information of any kind relative to administration is ever vouchsafed to the citizens. Indeed, he would be a valiant man who would ask for it." (R. B. Fosdick, *European Police Systems*, New York, 1915, p. 77.)

"The general attitude of the police toward the public is also indicative of the autocratic spirit of the German government. The unfailing courtesy of the English police is often lacking in the German forces. Arbitrariness too frequently marks the conduct of the latter in their relations with the public. The great powers of the police official, his right to fine and imprison without judicial process, his exemption from prosecution for false arrest, breed an arrogance hardly to be tolerated in democratic communities. To be sure, the temper and character of the Teutonic people are attuned to this kind of stern management. They seem even to demand it. If it be true, as has been asserted, that a Berlin *Schutzmann* in Trafalgar Square would provoke a riot in two hours, it is equally true that the peaceful-mannered London 'Bobby' would be overwhelmed in Berlin. Back of the sharp contrasts between the English and German police are fundamental differences in race-history and national character." (*Op. cit.*, pp. 78–79.)

is true in a measure, though there are some advantages in an administration of the national laws by the local authorities, because it then becomes more feasible to adjust to local needs laws which are not well adapted to conditions in all parts of the country.

In this country the police has been almost entirely under local control. The Federal Government maintains a small detective force for the enforcement of the Federal laws. A few of the States maintain small police organizations. The metropolitan police of a few of the large cities is administered by the State government. But aside from these exceptions the municipal police forces are controlled by the municipal governments, and the county police forces by the county governments.

There is probably no valid objection to the Federal detective bureau, so long as it limits its activities to the enforcement of the Federal laws. The State police bodies have usually been established for the purpose of detecting and repressing crime in the rural districts. There is no doubt that the rural districts have not usually had efficient police protection, so that the State police has been useful for the repression of rural crime. It has also been used in the place of the militia for the suppression of labor riots and similar disturbances. This also is a legitimate use for a State police, when it does not exceed its powers in so doing. There is, however, more or less evidence that it has sometimes been used for the suppression of strikes in the interests of employers. This is the unenviable reputation of the Pennsylvania State Constabulary.[1] Members of the State police in several States have at times been guilty of brutal conduct which has earned for them the title of the "American Cossacks."

It goes without saying that lawlessness and brutality are not limited to the State police. The militia have frequently been guilty of similar conduct when called out to perform police duty,

[1] Numerous instances of brutal and illegal acts in the suppression of strikes by the members of this State police force are described by C. A. Maurer, *The Constabulary of Pennsylvania*, Reading, Pa. See also H. W. Laidler, *Boycotts and the Labor Struggle*, New York, 1913, pp. 20–25.

The opposite side is stated by Katherine Mayo in a book which furnishes much information, but is too eulogistic and not sufficiently critical. (Katherine Mayo, *Justice to All, The Story of the Pennsylvania State Police*, New York, 1917.)

and the same is true of the municipal police. The militia are not under constant discipline, and it is, therefore, not altogether surprizing that they should be somewhat disorderly. On the other hand, they are usually in close touch with the people and have more or less sympathy with the workers at the time of a strike.

The regularly constituted police organizations, such as the State and the municipal police, should be under thorough discipline, and should be directed to enforce the law without any class discrimination. Where they are lawless and brutal, it is due to the fact either that they are not well disciplined, or are being used in the interest of a class. The latter seems to be the explanation of the lawless conduct of the State police in several States. The true remedy, however, is not to abolish them entirely, as has been advocated by some of the representatives of labor, for they are needed in some parts of the country to protect the rural inhabitants. There are also occasions when they can be legitimately used in connection with industrial warfare, to quell rioting, to prevent the destruction of property, etc. The representatives of the people, therefore, in the legislature and in the gubernatorial chair should see to it that no class in the commonwealth gains control of the State police in order to use it for unlawful purposes.

The State control of the metropolitan police in some of our large cities, such as Saint Louis and Boston, has usually arisen because the municipal government has been corrupt and inefficient, or was supposed to be so by the inhabitants of the State. In many of these cases this has doubtless been true. And inasmuch as the large cities constitute hiding places for the criminals who operate throughout the State, there is much justification for a State supervision and control over the metropolitan police in order to insure its efficiency. On the other hand, some injustice is done to the urban population by taking away from it the control over its own police force.

In this country, with its decentralized form of government, the control of the police is destined to be local in the main, unless the government becomes much more centralized. The local police authorities should, however, coöperate with each other as much as possible in order to make the repression of crime nation-wide in its efficiency.

The Functions of the Police

The functions of the police are as numerous as the powers which are given to them by the law. We may classify them broadly as follows:

1. To apprehend criminals.
2. To protect the innocent.
3. To perform various tasks in behalf of the safety and welfare of the public.

The apprehending of criminals has become a veritable art in itself in which many of the sciences are utilized. Whenever a crime has been committed, it becomes essential to conserve and interpret all of the available evidence, which may include clothing, parts of the human body, imprints upon bottles, footprints, etc. In fact, any object may at some time or other become a piece of evidence in a criminal case.

When the criminal or person accused of the crime has been captured, it becomes necessary to identify him. But for this purpose various methods of identification have been devized, such as the anthropometric and the dactyloscopic or fingerprint methods.[1] The fingerprint method is rapidly becoming the principal means of identification because of its accuracy and the ease with which it can be applied. Having secured these facts, it is the duty of the police to present them in court in order that the evidence may be examined and judged by the judicial authorities.

But it is the duty of the police not only to capture the guilty, but also to protect the innocent. The latter is a duty which the police are apt to forget in their zeal to apprehend criminals. As a matter of fact, it is almost if not quite as important that human rights and liberties should be safeguarded and conserved as it is to apprehend criminals. Consequently, it is essential that the police should be given a training in political science and law which will enable them to comprehend these rights and liberties, and should be kept under a rigid discipline which will restrain them from overstepping the bounds of their legitimate powers and prerogatives.

[1] I have described these methods of identification and many other police methods in the chapter on the police agency in my book entitled *The Principles of Anthropology and Sociology in Their Relations to Criminal Procedure*, New York, 1908.

The third group of functions includes various tasks in behalf of the safety and welfare of the public. Among the earliest of these tasks have been the regulation of traffic upon the public highways, and the maintenance of order in crowded public places. But in recent years there has been a strong tendency to assign to the police numerous tasks in connection with sanitation, the census, the regulation of labor conditions, etc. This tendency has resulted from the vast amount of legislation in behalf of social welfare which has been enacted recently. It is desirable that the police should be used as much as possible for these purposes, so long as these tasks do not interfere with their primary functions of repressing crime and maintaining order.

In fact, there is no reason why policemen should not become exceedingly useful public servants far beyond their present usefulness. Each policeman should, instead of idling along his beat, be engaged in becoming well acquainted with his neighborhood, and should serve as an agent and representative of the government in many important respects. This would develop in him a feeling of responsibility and a genuine dignity which he now usually lacks, and would serve as a safeguard against the anti-social attitude which he frequently acquires.

As the strong arm of the state the police is entirely or mainly under the direct control of the executive branch of the government. But the judiciary also usually has a certain amount of control over the police, while the legislature through its legislative power can indirectly influence the police greatly. It is desirable that the police should be mainly under the direct control of the executive, for direct control by the legislature would make the police more or less ineffective, while it is dangerous to confuse the judicial functions of the courts with executive functions.

The Training and Selection of the Police Force

In this country it has been customary to choose the higher police officials from the civilian class. It is rarely ever desirable to choose these officials from the ranks of the policemen, because they lack the necessary preliminary education, while the routine police work unfits them in some ways for the higher positions. But it has unfortunately been true in this country

that civilian officials have frequently been chosen for partizan political reasons, and not on account of their efficiency. This has been true not only where there has been a single head or a partizan police board, but even where there has been a bi-partizan board.

In Europe the police officials have ordinarily had more training and special experience for police work. Frequently army officers have been placed in these positions. But while the military training is useful in some ways for purposes of discipline, there is always the danger of introducing the military point of view in dealing with police problems. In a few countries, as, for example, in Germany, many of the higher police officials have had special training in political economy and administrative law. These men have made the police their profession, and doubtless constitute the best trained group of police officials in the world.

What is most needed is an extension of this special training. These police officials should come from a group of men who are specially trained not only for the police profession, but also to become judges in the criminal courts, and administrators of prisons. These men should receive a thorough education in political, economic, and social science, in law, and in criminology. Then they should have a preliminary experience in the courts, in the police department, and in the prisons. After this experience they should be assigned on the basis of aptitude and liking to the branch for which they are best fitted. Some of them would become public prosecutors and defenders and eventually judges, some of them prison officials and administrators, and some of them police officials. The preliminary experience in all of these lines of work would prepare them for everything which has to do with crime and criminals. At present most of those engaged in performing these functions are not specially prepared for their tasks, and have little knowledge of each other's work, despite the intimate relation which exists between their respective functions.

The subordinate positions can be readily filled from the ranks of the policemen. With respect to the qualifications for the men in the ranks, it is needless to say, to start with, that they should have a requisite amount of strength, a good moral character, and a fair degree of intelligence. But some special educa-

tion and training in addition is essential. After the preliminary examination has been taken the police recruit should be given a course of instruction covering several months. This course should furnish him an elementary knowledge of criminal law, an acquaintance with the methods of identifying criminals, and a sufficient knowledge of the nature of legal evidence to enable him to gather evidence and to protect it from destruction until it can be examined by the judicial authorities.

From the uniformed force the best men should be selected to become the subordinate officers and the detectives. These men should be given additional training in law, police methods, and in criminology. They should acquire some knowledge of criminal anthropology and psychology, which will enable them to distinguish between the different types of criminals, and to understand the principal methods used by criminals. The work of these police officers will be much more effective when they can discern the difference between an occasional criminal and a professional criminal, between an insane criminal and a criminal by passion, while a knowledge of criminal methods will enable them to check much more frequently the activities of criminals.[1]

The science of criminology contains a rich store of information for the police. The study of this science should, of course, be supplemented with practical experience in the field. The police will accomplish most effectively their function of repressing crime when they apply scientific knowledge and practical experience to the work of foiling the activities of criminals. More or less practical experience many of them already have, but they have not yet used scientific knowledge to any great extent.[2]

[1] Perhaps the leading if not the only school of this nature is the school for the scientific police in Rome. Its curriculum is described briefly by its director as follows: "Besides description (Bertillon system and dactyloscopy) and legal photography, the principal courses consist in judicial investigations and applied anthropology and psychology. Both of the latter are taught according to the above mentioned principles, resulting in a complete reform in police methods. The course is given with the help of convicts in the prison, in the proximity of which the school is located." (S. Ottolenghi, *The Scientific Police*, in the *Jour. Crim. Law*, Vol. III, No. 6, March, 1913, p. 880.)

[2] Fuld says that in order to become acquainted with the professional criminal the policeman "should study his habits of life, his personal character, and his business methods as carefully as the hunter studies the charac-

A few of the cities in this country maintain police schools, and there are a number of such schools in Europe.[1] It is doubtful if the training in any one of them is as thoroughgoing as it should be, while many more of them are needed. It is to be hoped that before long every policeman will receive adequate preparation before he is entrusted with the important public duties of protecting society from crime and of maintaining order.

The Integrity of the Police

The efficiency of the police depends not only upon its training but also upon its integrity. One of the most difficult of police problems is the safeguarding of the integrity of the police. This is because there are many individuals to whose interest it is to corrupt the police. Among these are the criminal classes who wish freedom to carry on their criminal activities, the vicious classes who wish freedom to carry on vicious activities which are forbidden by the law, and also a good many citizens who are not necessarily or ordinarily criminal or vicious, but to whose pecuniary interest it is to violate various regulations and ordinances promulgated by the government.

The police are therefore in constant danger of being tempted by bribes and other inducements to refrain from doing their duty. In fact, the police department is perhaps the most vulnerable point in the honesty of a government. This has been well illustrated in the government of many of our cities. Municipal government in this country has been notoriously corrupt. This corruption has usually demoralized the police department first of all, and frequently more than any other department.[2] While police corruption may not in the long run do as much

ter and habits of the animal he hunts. He should become intimately acquainted with the criminal's inner consciousness and point of view; in no other way can he hope to develop skill in defeating his criminal purposes." (L. F. Fuld, *Police Administration*, New York, 1909, p. 151.)

[1] Some of the European police schools are described by R. B. Fosdick, *op. cit.*, pp. 211–226.

[2] See, for example, the *Report of the Senate Committee Appointed to Investigate the Police Department of the City of New York* (The Lexow Committee), Albany, 1895, 5 vols.; *Minutes of the Police Investigation by the Special Committee of the New York Board of Aldermen*, New York, 1912–1913; *Report of the City Council Committee on Crime of the City of Chicago*, Chicago, 1915.

harm to the public as some other forms of corruption, such as the granting of public franchises to private corporations without adequate remuneration, it is nevertheless a prolific source of evil. It is an essential part of any widespread system of "graft" in government, for the corrupt political "bosses" and officials need the strong arm of the police to carry out most of their dishonest designs.[1]

The first and foremost preventive of police corruption is the promotion of honesty in the government in general. Specific measures which may be used are to remove the administration of the police as far as possible from partizan politics, to make the tenure of office in police positions permanent, and to make the remuneration of the police adequate to satisfy ordinary needs and reasonable desires, thereby diminishing as far as possible the incentive to supplement their pay by means of dishonesty and failure to perform their duty.

Evil Influence of Unenforceable Laws Against Vice

Another factor for police corruption in this country has been the existence of numerous unenforceable laws. These laws have been enacted partly as a result of the Puritanical ideas which are more or less prevalent in this country, and which have given

[1] A first hand observer has described the world of graft and its grafters in the following graphic language: —

"A 'grafter' is one who makes his living, and sometimes his fortune, by 'grafting.' He may be a political 'boss,' a mayor, a chief of police, a warden of a penitentiary, a municipal contractor, a member of the town council, a representative in the legislature, a judge in the courts, and the Upper World may know him only in his official capacity; but if the Under World has had occasion to approach him for purposes of graft and found him corrupt, he is immediately classified as an 'unmugged' grafter — one whose photograph is not in the rogues' gallery, but ought to be. The professional thief is the 'mugged' grafter; his photograph and Bertillon measurements are known and recorded.

"The World of Graft is wherever known and unknown thieves, bribe-givers, and bribe-takers congregate. In the United States it is found mainly in the large cities, but its boundaries take in small county seats and even villages. A correct map of it is impossible, because in a great many places it is represented by an unknown rather than by a known inhabitant, by a dishonest official or an unscrupulous and wary politician rather than by a confessed thief, and the geographer is helpless until he can collect the facts, which may never come to light." (J. Flynt, *The World of Graft*, New York, 1901.)

rise to the desire to prohibit many vicious and so-called vicious practises. But they are due perhaps still more to the general notion that almost anything in the way of enforcement or of prohibition can be accomplished by means of legislation. As a comparatively new country addicted to hasty experimentation, we have not had as much experience as older countries which would give us national traditions concerning the folly of such legislation.

There have been several evil results from this legislative tendency which are of importance with respect to the police. In the first place, it has created a general disrespect for law. This situation has inevitably reacted upon the police to make them careless and indifferent to the enforcement of law in general.

In the second place, it has put on the statute books many laws which are not approved of by a considerable portion of the population. Whenever the majority has believed that a certain form of conduct should be prohibited on the ground that it is immoral and vicious, it has usually seen fit to do so, regardless of the fact that a powerful minority might succeed in nullifying it in practise. This situation has been greatly aggravated by an enormous immigration from many countries differing considerably from each other in culture and moral standards. This immigration has created a racially heterogeneous population with diversified ideas as to the morality of many forms of conduct.

In the third place, this legislative tendency weakens public sentiment in behalf of the rights and freedom of the individual. It blunts the fine sense of respect for the individuality of others which permits the personality to develop as spontaneously as possible, even though the individual will frequently do himself injury in so doing, in the belief that a high degree of freedom is in the long run preferable to a large amount of regulation. It encourages the unthinking spirit of the mob which attempts to force every one into a common mold.

In the fourth place, largely as a consequence of the above-mentioned conditions many of these laws furnish an admirable means of blackmail for the police. This is because, while they are in the main unenforceable, they can be used by the police as a club with which to extort bribes and hushmoney. For

example, a law with respect to the liquor traffic or sabbath observance may be so obnoxious to a large part of a community that it would be impossible for the police to enforce it universally. But the police can use the law as a threat to harry individual violators into paying them tribute for refraining from arresting them and securing their conviction. There are many laws upon our statute books which are practically dead letters so far as enforcement is concerned, and yet furnish the police an enormous amount of unlawful revenue.[1]

Upon the basis of these laws an elaborate system of levying tribute upon their violators arises. A more or less definite tariff becomes established according to which the liquor dealer, the gambler, the prostitute, the theatrical manager, etc., pay for the privilege of violating these laws. This tribute is collected usually by patrolmen or subordinate police officers, and is transmitted by them to the higher police officials. Each member of the police force who comes in contact with the graft profits by it, and thus a large part of the force is corrupted.

Nor does the iniquitous influence of these laws necessarily

[1] According to the report of the Chicago committee on crime, the professional gamblers in that city were paying $50 a week for police protection for each of the "handbooks" operated. As it was estimated that there were 300 of these books, the total amount paid annually to the police in this form of graft alone would aggregate nearly $800,000. (*Op. cit.*, p. 166.)

Goodnow has characterized the effect of these laws upon the integrity of the police as follows: —

"One of the results of attempting to determine the criminality of an act by its viciousness has been to force upon the police of cities in the United States work which, under the standards of morality prevailing in the cities, it is practically impossible for them to perform. . . . Public opinion seems to justify the passage of statutes upon the enforcement of which that same public opinion does not insist. The result is a temptation for the police which human nature is hardly strong enough to resist. The police force becomes a means by which the whole city government is corrupted. There has never been invented so successful a 'get-rich-quick' institution as is to be found in the control of the police force of a large American city. Here the conditions are more favorable than elsewhere to the development of police corruption, because the standard of city morality which has the greatest influence on the police force, which has to enforce the law, is not the same as that of the people of the state as a whole which puts the law on the statute book. What the state regards as immoral the city regards as innocent. What wonder then if the city winks at the selling by the police of the right to disobey the law which the city regards as unjustifiable?" (F. J. Goodnow, *Municipal Government*, New York, 1910, pp. 265–266.)

stop with the police department. It has frequently happened that some of this graft has passed on to officials in other executive branches of the government, to judges, and to legislators. So that the integrity of every branch of the government has been stained and its efficiency weakened by the influence of these laws.

The responsibility for these laws does not rest upon the legislators alone, many of whom indeed are well aware of the folly of this legislation. It must rest largely upon a narrow-minded but influential portion of the public which brings much pressure to bear upon the legislators to enact such legislation. This portion of the public is represented through such private organizations as societies for the suppression of vice, the churches and other religious organizations, the social hygiene associations, the anti-saloon leagues, and similar organizations of a sentimental nature. Having secured the desired legislation this portion of the community sits back in smug complacency at having registered its protest at these vices and alleged vices and thus satisfied its conscience, regardless of the fact that these laws are in the main unenforceable, and that they are certain to demoralize to a considerable extent the police and other branches of the government.

It would be much preferable not to have these laws at all, since they do no good and are potent forces for corrupting and debasing the police. It is hardly necessary to add that they also do a vast amount of injury by spreading disrespect for law in the population at large, and by making potential if not actual criminals of those who pay the blackmail and hushmoney to the police. As a result of placing the stigma of criminality unnecessarily upon many persons who may be vicious but are not criminal to start with, they degrade all of them, and drive some of them to consort with professional criminals, and to become criminal in turn.

The political reform movements in the cities and sometimes in the states in this country well illustrate these errors in the treatment of vice. These movements are usually accompanied with a good deal of emotional exaltation. Under the influence of this state of feeling the moral enthusiasm of the reformers leads them to pass drastic laws against the different vices and alleged vices, and to make abortive attempts to enforce these

laws. These attempts invariably fail for the reasons which have been mentioned. But what is much worse is that by getting these unenforceable laws upon the statute books the reformers have created powerful instruments for blackmail, bribery, and police corruption when the administration of these laws pass into the hands of those who are prone to commit these crimes.[1]

Ugly and harmful though the genuine forms of vice are, it is not to be expected that they can be abolished in a day. The genuine forms of vice are those that detract from the spontaneous expression of human nature, in so far as this expression is compatible with the conditions of social life. Many of the modes of conduct alleged to be vicious by the moral reformers cannot be regarded as such when judged by the above criterion. But neither the genuine nor the alleged vices can be uprooted at once, for they arise out of fundamental traits of human nature and of the material and social conditions in which men and women live. Inasmuch as human beings are prone to resent wholesale attempts to make them moral when they are not trespassing in an obvious manner upon the rights of others, there is usually a serious reaction after the failure of such an attempt which serves as a setback to social progress.

They have learned to deal more wisely with vice in Europe. There they do not usually attempt to enforce morality in private matters by means of the law. In fact, even in some of the autocratically and oligarchically governed countries there is more liberty in many personal matters than there is in this country. There are also fewer unenforceable laws to corrupt the police, and this is one reason why the European police is on the whole more honest than our police.[2]

[1] See, for descriptions from practical experience of the harmful effects of reform movements in our cities, A. Hodder, *A Fight for the City*, 1903; B. Whitlock, *On the Enforcement of Law in Cities*, Indianapolis, 1913.

See especially in Hodder's book Chapter V entitled "The Alliance between Puritan and Grafter," in which he shows how the Puritan by his uncompromizing position unconsciously helps the grafter.

See also two articles by W. J. Gaynor on the lawlessness of the police, in the *North American Review*, Vol. CLXXVI, 1903; and an article by Sydney Brooks entitled *Tammany Again*, in the *Fortnightly Review*, Dec., 1903.

[2] Fosdick calls attention to this repeatedly, as, for example, in the following passage: —

"Perhaps the most important safeguard against police corruption is negative in character. The European police are not called upon to enforce stand-

The above-mentioned conditions have been the principal causes of the so-called "police system" in this country. By this term is ordinarily meant an organized system within the police department for gathering and apportioning the blackmail levied upon the violators of the law. These offenders include not only the violators of the laws against vice, but also habitual and professional criminals with whom the police are frequently in collusion. The details of the "police system" have been exposed and laid bare in many of our cities by investigating committees, in the course of political campaigns, and in the trial of certain cases in the criminal courts.[1] These revelations have indicated the extent to which the safety of life and property in this country is menaced by police corruption.

Homicide in the United States

It is, of course, impossible to measure accurately the effect of police inefficiency and dishonesty upon the extent of crime. This

ards of conduct which do not meet with general public approval. There is little attempt to make a particular code of behavior the subject of general criminal legislation. The high moral standards of a few people are not the legal requirements of the state. Only occasionally is there any movement to place upon the statute books laws which serve only to satisfy the consciences of those responsible for them. This is a subject worthy of more attention than can be given in these pages. It strikes deep into the heart of the police problem." (R. B. Fosdick, *op. cit.*, p. 379.)

[1] For example, in 1912 the professional gambler Rosenthal was murdered for threatening to "squeal" on the police in New York City. The police lieutenant Becker and his accomplices were electrocuted for this murder. In the course of their trial much evidence was produced with regard to the "police system" in New York.

The Chicago committee on crime speaks of the collusion between the police and the professional criminals as follows: —

"There can be no doubt that one of the chief causes of crime in Chicago is that members of the police force, and particularly of the plain clothes staff, are hand in glove with criminals. Instead of punishing the criminal, they protect him. Instead of using the power of the law for the protection of society, they use it for their own personal profit. They form a working agreement with pickpockets, prowlers, confidence men, gamblers, and other classes of offenders. The basis of this agreement is a division of profits between the lawbreaker and the public official. The exact extent of this system it is impossible to determine, but there is no doubt that its ramifications are so wide as to cripple the machinery for the enforcement of the law." (*Op. cit.*, p. 184.)

is particularly difficult with respect to the crimes against property, because it is impossible to ascertain the total amount which is stolen. It is more feasible with respect to crimes against the person, and especially homicide, since most of the homicides are known. It is, therefore, of some interest in this connection to mention a few comparative statistics of homicide. In 1913 there were in Chicago 262 arrests and arraignments for murder, in New York 131, and in London 36.[1] It has been estimated from mortality statistics in census reports and from other sources of information that during the decade ending with 1909 the average homicide rate in the registration area in the United States was 4.3 per 100,000 of population, as against an average homicide rate in England and Wales of 0.9 per 100,000 of population. "In other words, there was an excess of 378 per cent. in the homicide mortality of the United States over the corresponding homicide record of England and Wales.[2]

The excessive amount of homicide in this country is probably due in part to disregard for human life, which is in turn due at least in part to the new and somewhat unsettled conditions in this country. But it is certainly due to a considerable extent to the inefficiency of the police. This inefficiency has unfortunately been seconded often by the weakness of the courts in repressing crime on account of technicalities in the procedure.

Preliminary Detention, Provisional Liberation, and Indemnification

In order that the police may be able to do their work effectively it is essential that they should be given more or less power. They must be able to arrest and detain suspected persons. But

[1] *Report of the Chicago Crime Committee*, p. 9.

[2] F. L. Hoffman, cited in the *Jour. Crim. Law*, Vol. III, No. 5, Jan., 1913, p. 676.

In a more recent article Hoffman has estimated that the mortality from homicide in the registration states of the U. S., 1910–1914, was 2.9 per 100,000 of population in the New England states, 4.8 in the Middle Atlantic states, 13.1 in the Southern states, 4.2 in the North Central states, 8.7 in the South Central states, and 10.6 in the Western states. In thirty-one of the largest cities the rate was 5.0 from 1895 to 1904, and 8.1 from 1905 to 1914. In 1915 the rate in these cities was 8.3, the highest rate being 85.9 in Memphis, Tenn. (*The Spectator*, Vol. XCVII, No. 25, Dec. 21, 1916, pp. 278–280.)

these powers must be safeguarded as much as possible against their abuse and misuse. There is probably no jurisdiction in the world where a policeman does not have the power to arrest a person who commits or attempts to commit a crime in his presence. Furthermore, he is usually permitted to arrest a person suspected of having committed a serious crime, such as a felony, even though he has not witnessed it. But under other circumstances he is usually not empowered to arrest unless he has a warrant, or written mandate, which has been issued by a judge.[1]

Having made an arrest he is usually required to bring the person in custody before a judge within a limited period of time, as, for example, within twenty-four hours. The accused person must then be tried or held for trial by the judge. Otherwise he must be released from custody. The common law writ of *habeas corpus* is still another safeguard against unlawful detention. This writ is issued by a court and commands that a person in confinement be brought before it in order to determine the legality of the confinement.

The principal measure used to make preliminary detention unnecessary is provisional liberation. The granting of provisional liberation depends partly upon the law and partly on the judge. The law specifies which crimes with which persons in custody are accused are bailable, and which crimes are not bailable. But a certain amount of discretionary power is usually left to the judge. Furthermore, liberation on bail may sometimes be granted by police officials. Liberation on bail depends upon the giving of security by sureties or by the prisoner himself for the reappearance of the prisoner.

In some jurisdictions the judge may under certain circumstances release the prisoner upon his own recognizance without requiring any security in the way of bail. Furthermore, it is now becoming customary to obviate any preliminary detention whatever in minor cases by issuing a summons to appear in court at the proper time without making any arrest.

Persons undergoing preliminary detention should be given the best possible treatment. They should not be imprisoned with convicted criminals as is now done in most places, but should be

[1] See, for example, the *New York State Code of Criminal Procedure*, Sections 145–221.

detained in a place not a prison and much more comfortable than an ordinary prison. This is essential not only in justice to the accused, who are presumed to be innocent until found guilty, but also to impress upon the minds of the public the distinction between the unconvicted prisoners and the convicted criminals.

Witnesses should not be detained except under order of a court and when there is good reason to believe that their testimony cannot be secured without such detention. They should never be confined in a prison, but in a special house of detention. They should be remunerated by the state for the time they have lost.

Reparation should be made as far as possible to the innocent persons who suffer the evils of preliminary detention and prosecution. At present it is possible for the person who is acquitted to sue the police and the complainant for damages for malicious or unreasonable prosecution. If, however, the policeman or the complainant has no property, such a suit is of no value, even if successful. In this country there is no indemnification by the state for unjustifiable prosecution or for unjust conviction. And yet there can be no question about the right of the victim of unjustifiable prosecution or conviction to receive reparation. The state should compensate the innocent victim of its police and judicial functions just as much as it compensates property owners when it exercizes the power of eminent domain. A pecuniary compensation is the least it can give, for it can never make reparation for the humiliation, dread, and other forms of mental anguish and physical suffering caused by unjustifiable prosecution, and unjust conviction and punishment.

Furthermore, it is expedient for the state to make indemnification in order to prevent as far as possible the rankling sense of injustice sure to arise in the minds of its victims which may at some time or other be turned against the state. Indemnification would also cause the state to exercize greater precautions against error in the trial of accused persons. Indemnification is now given in different ways and in varying degrees in several European countries, such as Switzerland, Portugal, Sweden, Norway, France, Austria, and Germany.[1]

[1] An excellent summary of this legislation is given in the following article: E. M. Borchard, *European Systems of State Indemnity for Errors of Criminal Justice*, in the *Jour. Crim., Law*, Vol. III, No. 5, Jan., 1913, pp. 684–718.

The judges who come most closely into touch with the work of the police are the magistrates in the lowest courts, frequently called the police courts. These magistrates should watch the police carefully and restrain them from any unlawful use of their power. It is sometimes asserted by representatives of the police that they are restrained too much by these magistrates, so that they are greatly hampered in their work of suppressing crime. But in all probability there is more danger of the magistrates restraining the police too little than too much.[1]

[1] The police court in connection with the work of the police has been discussed from different points of view in various books, as, for example, the following: W. McAdoo, *Guarding a Great City*, New York, 1906; H. R. P. Gammon, *The London Police Court*, London, 1907; H. L. Adam, *Police Work from Within*, London, 191–?.

PART V

PENOLOGY

CHAPTER XXII

THE ORIGIN AND EVOLUTION OF PUNISHMENT

The objects of punishment: vengeance; elimination; restraint; deterrence; restitution; reformation; etc. — The varieties of penalties — Imprisonment — Transportation — Poetic penalties — The scope of punishment — The severity of punishment: influence of despotism, war, magic, and religion — The Inquisition — The modern humanitarian movement: the Renaissance; the industrial revolution; the division of labor; modern science.

In Chapters II and III have been discussed the factors which give rise to the forms of social reaction ordinarily called punishment. Back of these punitive reactions lie the emotions of fear and anger, and the reactions themselves acquire their dynamic force primarily from the protective and combative instincts which these emotions accompany. The emotions and instincts are in the first instance individual. But when they are aroused in many members of a group, they tend to reënforce each other and to lead to coöperative action.

I have stated that these social reactions have been observed in some animal species, where the members of a group have attacked one of their fellows who has offended them, and have injured or killed it, or have driven it away. Presumably the same kind of spontaneous reactions took place among the earliest men. Among the primitive races which have been observed these reactions have become somewhat organized and conventionalized. They are rationalized and justified by means of a philosophy which is largely religious and magical in its nature. In many cases the paternal authority has been utilized to organize the penal function under a patriarchal form.[1] In some cases the patriarchate probably furnished the starting point for the centralization of authority under the chieftain, priest, or king.

When the art of writing was discovered and the state came

[1] *Cf.* J. Makarewicz, *Évolution de la peine*, in the *Arch. d'anth. crim.*, Vol. XIII, March, 1898, pp. 129–177.

into existence, written law became possible. Punishment now reached its full development as a definitely organized, conscious reaction against what injures or is presumed to injure society.[1] The state, first under a monarchical and then under a democratic form, acquired much power to enforce punishment. The law now stated in great detail the nature and purposes of punishment.

The Objects of Punishment

Among primitive peoples almost the only penalties appear to have been mutilation, death, and banishment.[2] Generally speaking, the object of primitive penalties was to get rid of the culprit who had incurred the wrath and had aroused the fear of the community. This object was attained by means of death or banishment into exile, which frequently meant death. In the higher stages of culture the penalties became more varied, partly because other objects of punishment came to be recognized, but also because a larger number of punitive methods became feasible.

There is not the space to describe the many different kinds of penalties which have been used in barbarous and civilized societies.[3] But a cursory survey of the principal varieties will

[1] Westermarck defines punishment as follows: — "By punishment I do not understand here every suffering inflicted upon an offender in consequence of his offence, but only such suffering as is inflicted upon him in a definite way by, or in the name of, the society of which he is a permanent or temporary member." (E. Westermarck, *The Origin and Development of the Moral Ideas*, Vol. I, London, 1906, p. 169.)

Oppenheimer defines punishment as follows: — "Punishment is an evil inflicted upon a wrongdoer, as a wrongdoer, on behalf and at the discretion of the society, in its corporate capacity, of which he is a permanent or temporary member." (H. Oppenheimer, *The Rationale of Punishment*, London, 1913, p. 4.)

[2] Primitive penalties have been described in numerous descriptive writings about primitive peoples, and in many treatises upon the evolution of punishment. In the above-mentioned writings of Westermarck, Oppenheimer, and Makarewicz are to be found brief discussions of this subject.

[3] These penalties have been described in many historical and other works, of which I will mention the following: — G. Ives, *A History of Penal Methods*, London, 1914; L. O. Pike, *A History of Crime in England*, London, 1873–1876, 2 vols., W. Andrews, *Punishments in the Olden Times*, London, 1881; J. F. Stephen, *A History of the Criminal Law of England*, London, 1883, 3 vols.; E. F. Du Cane, *The Punishment and Prevention of*

reveal most of the objects which these penalties have been intended to attain. The fundamental object psychologically probably is to wreak vengeance upon the offender. The primary avowed object doubtless is to get rid of the culprit who endangers the public. Along with this object frequently goes a desire to injure the guilty one for the evil which he has caused.

But other utilitarian objects have appeared and have influenced the character of punishment. The purpose of deterring others from committing these offenses plays an important part. The idea of restitution, in so far as that is possible, is embodied in many penalties. The temporary restraint of the criminal is the object of some penalties. The utilization of the labor of the offender is effected by some forms of punishment. A revenue to the state is derived from some punishments. A poetic relation is to be discerned between some offenses and the penalties prescribed for them. In recent times the purpose of changing the character of the criminal by means of penal measures, namely, reformation, has been playing an increasingly important rôle.

The Varieties of Penalties

Capital punishment has been inflicted in many different ways. Among these may be mentioned hanging, burning, beheading, boiling, pressing, poisoning, flaying, dismemberment, precipitation from a height, breaking on a wheel, crucifixion, drowning, stoning, suffocation, starving, electrocution, etc. In many of these cases it has been the intention to cause the victim as much suffering as possible before death supervened. In fact, in the past capital punishment was usually preceded by torture.

When torture has not resulted in death, it has frequently resulted in mutilation for life. The purpose of this mutilation was usually not only to cause suffering to the offender, but also to furnish the public horrible examples of the consequences of penality.

Banishment, when practised by primitive peoples, usually meant death, because the offender was driven into the hands of

Crime, London, 1885; F. H. Wines, *Punishment and Reformation*, New York, 1895; C. Desmaze, *Les pénalités anciennes en France*, Paris, 1866; F. Helbing, *Die Tortur, Geschichte der Folter im Kriminal-verfahren aller Völker und Zeiten*, Berlin, 1902, 2 vols.

hostile groups, or into the wilderness where he was almost certain to perish from starvation or as the prey of wild beasts. When the state came into existence, banishment meant exile from the territory of the state. Sometimes when the offender could not be captured, he was declared an outlaw to be punished by death or otherwise if captured. So that outlawry constituted a form of banishment from the populated areas within the state.

When, as a result of the evolution of agriculture and industry, labor became valuable, offenders were preserved and made slaves or serfs. They were set to work to till the soil, to row in galleys, etc. Later, when the prison system came into existence, they were forced to work in the prisons, and to produce objects of value. At the present time their labor is sometimes used outside of as well as inside penal institutions.

The idea of restitution in penal treatment appeared many centuries ago. In the Anglo-Saxon law it became possible for the offender to compound his crime by the payment of *bot* or *wergild*. Later the principle of restitution of stolen property and reparation for bodily injury passed largely into the civil law, where it is administered mainly under the law of torts. It is perhaps not sufficiently applied by the criminal law today. This is a principle in the application of which the civil and the criminal law should coöperate more fully than they do at present. Indeed, exemplary damages as granted by the civil courts strongly resemble a form of penal treatment.

The practise of fining, which is much used in modern criminal law, is somewhat related to penal restitution. The fine is frequently supposed to represent in a measure the injury which has been done to the public by the crime. But the fine is usually paid to the state, while the individual victim of the offender receives nothing in the way of restitution. So that fining constitutes an exceedingly inadequate application of the principle of restitution.

Punishment by shame has frequently been used in the past. Among primitive peoples punishment by ridicule was frequently used. During the last few centuries have been used such punishments as the pillory, the stocks, branding, the tumbril or wagon upon which the offender was exposed, the cucking stool (*cathedra stercoris*) or chair upon which the offender was exhibited in public. Two other purposes doubtless played a part in the

application of these penalties, namely, their deterrent influence upon the public, and in order to make known these offenders to the public, who could thereafter beware of them. This sort of punishment has fallen largely into desuetude in modern times, partly for humanitarian and partly for other reasons.

Imprisonment

Imprisonment for purposes of detention has been used for a long time. But imprisonment as a method of penal treatment has not been much used until comparatively recent times. Imprisonment did not attain great importance as a penal measure before the seventeenth or eighteenth century. It received its greatest development during the nineteenth century.[1]

Dungeons in castles and forts and other kinds of prisons have long existed. But these were ordinarily used merely as places of temporary detention for criminals and political prisoners. Under the unstable conditions of the past it was not easy to keep offenders under duress for long periods of time. War and other disturbances rendered social conditions so unstable as to make it difficult to maintain permanent places of incarceration.

Furthermore, imprisonment was not sufficiently immediate and drastic as a form of punishment to meet the needs of the past. Consequently, ancient penalties were ordinarily summary in character, and did not require for their application the long delay of imprisonment. But in modern times it has become the principal form of penal treatment. I shall, therefore, describe the prison system at considerable length in a later chapter.

In the early days of the prison system the living conditions in the prisons were very bad. Ordinarily the prisons were overcrowded. Small provision was made in the way of food, sleeping accommodations, and sanitary conveniences. Little attempt was made to segregate the different classes of prisoners. Consequently, old and young, male and female, hardened criminals and youthful beginners in crime, the guilty and the innocent, debtors, paupers, and the insane were mingled together in the

[1] See, for brief accounts of the evolution of the prison system, G. Ives, *A History of Penal Methods*, London, 1914; E. F. Du Cane, *The Punishment and Prevention of Crime*, London, 1885; F. H. Wines, *Punishment and Reformation*, New York, 1895.

prisons. Little attempt was made to provide work for the prisoners or to keep them occupied in any other way.

These horrible conditions aroused the efforts of prison reformers like John Howard,[1] Samuel Romilly, and Elizabeth Fry, who, during the latter part of the eighteenth century and the early part of the nineteenth century, endeavored to better these conditions.[2] These prison conditions led inevitably to the physical degeneration and the moral degradation of their inmates, and through them had a baneful effect upon the public at large.[3] It was, however, difficult to interest the public in conditions so remote from their customary activities. The methods used by these reformers were mainly sentimental, philanthropic, and religious in their character, and could not, therefore, be very effective in reaching the fundamental causes of these prison evils. Consequently, it is doubtful if these re-

[1] J. Howard, *The State of the Prisons in England and Wales*, 2d ed., Warrington, 1780; *An Account of the Principal Lazarettos in Europe*, Warrington, 1789.

[2] W. H. Render, *Through Prison Bars, The Lives and Labours of John Howard and Elizabeth Fry*, London, 1894 (?).

[3] The state of the prisons in England in the eighteenth century, as indicated by Howard's writings, has been described as follows:—

"Deprived of the very essentials of life — air, water, and food — the physical condition of prisoners was wretched in the extreme. But the moral atmosphere in which they lived was still worse. No attempt was made to classify or separate them. Untried prisoners and debtors, who formed the bulk of the permanent prison population, were herded with thieves, highwaymen, and murderers, and all alike lived in enforced idleness, which was a leading feature of the prison administration. In the day rooms men and women, sick and healthy, sane and insane, veterans in crime, and youthful offenders gambled, drank, swore, concocted burglaries, and even manufactured counterfeit coin." (R. F. Quinton, *Crime and Criminals, 1876–1910*, London, 1910, p. 169.)

"It is not surprising that under these conditions the germs of disease were constantly present in the gaols throughout the country, and that they should have become extensive laboratories for the cultivation and dissemination of fever. This actually occurred, and that particular fever which originates in overcrowding, filth, and poverty, was so constantly breaking out, that it came to be called 'gaol fever.' It was endemic in many prisons.

"The ravages of the disease, however, were far greater outside than inside. The clothing and bodies of prisoners seemed to be saturated with the poison. They carried it with them into Court, into their homes, into towns and villages, and even into our fleets, spreading infection everywhere." (*Op. cit.*, pp. 170–171.)

formers had much influence in bettering prison conditions, however worthy their motives may have been.

Another group of reformers who had considerable influence upon prison reform were the philosophers and scientists of the eighteenth century. Especially noteworthy among these reformers were the Encyclopedists who had much to do with bringing about the French Revolution. While their influence upon prison reform was not so direct as that of the prison reformers represented by Howard, it was probably greater in the long run, for they were largely responsible for the modern humanitarian movement which has been the principal factor in ameliorating the treatment of the criminal.

The Italian criminologist Beccaria was the representative of this group of eighteenth century thinkers who devoted special attention to crime and the criminal. In his writings he advocated with great skill many humanitarian reforms in criminal law and procedure and in penal treatment. Others who may be mentioned are Voltaire and Montesquieu.

Transportation

For a time an effort was made to relieve the pressure upon the prisons by means of transportation. The discoveries during the fifteenth and sixteenth centuries of vast areas of hitherto unknown and almost uninhabited land furnished good facilities for this form of banishment. At first it was customary to transport convicts to colonies where their labor was sold to the colonists. So that the convict labor aided somewhat in building up the new colonies. But, on the other hand, this system introduced an undesirable element into the colonies which the colonists naturally feared and resented. Furthermore, it established a partially enslaved class which was inconsistent with the libertarian ideas of most of the colonists. Consequently, as rapidly as the colonies won their independence of the mother countries, or became sufficiently powerful to refuse to admit convict laborers, it became necessary to adopt other methods of transportation.

When it was no longer possible to transport convicts to the colonies, penal colonies were established in regions as yet uncolonized. England established penal colonies in Australia

and Tasmania, France in New Caledonia and Guiana, Italy in Northeastern Africa, Russia in Siberia and Saghalien, etc. In the early days of this form of transportation prisoners were treated ordinarily with extreme harshness and cruelty in the convict ships and penal colonies.

In course of time this form of transportation also was gradually abandoned. Sometimes this was because colonies grew up in the vicinity of the penal settlements, and would no longer tolerate the penal colonies. But transportation was abandoned also because cellular confinement and penal servitude were adopted as methods of punishment in the mother countries.

Transportation is a modern form of the ancient penalty of exile or banishment. It was to be expected that as the newly discovered lands have become more or less settled and populated this form of punishment would disappear. Today penal colonies to which convicts are transported are maintained by only a few countries.

Poetic Penalties

Poetic penalties, which are related by similarity or in some other direct fashion to the crimes they punish, have frequently been used in the past. The tendency to impose these poetic penalties has much the same psychological basis as sympathetic magic. A resemblance, usually superficial in its character, or some other apparent relation is noted between an offense and a penalty, and it is therefore assumed by those who are applying the penal treatment that there is a necessary connection between the two, and that this penalty must be imposed upon this offense.

Poetic penalties are also based upon the romantic notion that poetic justice, so called, is accomplished by them. The ancient law of retaliation (*lex talionis*) was doubtless based in part upon this notion, so that an eye for an eye and a tooth for a tooth was supposed to attain poetic justice.

But poetic punishment doubtless has frequently been based in part upon the idea of prevention. For example, it has been recognized that emasculation for the rapist would effectually prevent him from committing rape again. The brank or metal gag, frequently called the scold's or gossip's bridle, would effectually restrain temporarily the tongue of the troublesome

woman. The ducking stool was supposed to cool the ardor of the temper of the scold.

The romantic purpose of attaining poetic justice has largely disappeared from penal treatment in our modern realistic world. The idea of prevention plays an ever increasing rôle in punishment. But it has become evident that poetic penalties frequently are not effective preventives in the long run. Emasculation may effectually prevent the rapist from rape. But it will not necessarily reform him from being as dangerous a criminal in other ways. The brank may effectually gag the gossip temporarily. But it may only serve to accentuate the malevolence of her malicious tongue after it has been removed. The ducking stool may cool the body of the scold, but may only serve to enhance the inward heat of her temper. It is probably true that poetic penalties with the object of prevention are most effective upon youthful criminals.

The Scope of Punishment

It must now be remembered that the penalties which have been briefly described have been imposed not only upon those who are ordinarily regarded as criminals today, but also upon many other persons who are not now usually regarded as criminals. Imprisonment for purposes of detention has been and still is imposed upon those accused of crime and upon witnesses. Torture has frequently been inflicted in the past upon the accused in order to extort confessions, and upon witnesses in order to secure desired evidence. The ordeals imposed upon accused persons in order to ascertain their guilt or innocence constituted in practise a form of torture.

Among primitive peoples and also sometimes among barbarous peoples the relatives of criminals were punished. This was due to the principle of collective responsibility for crime according to which the family of the offender, and sometimes an even larger group to which he belonged, was held responsible for his offense.

Magicians, sorcerers, and witches have frequently been punished. This was usually due to the fact that they were supposed to be practising black magic which was harmful to the community. So that the practitioner in black magic was regarded in

effect as a criminal. In later days it became customary to penalize the practise of any kind of magic. This was probably due in large part to the fact that religion had by this time acquired an ascendency over magic, and therefore jealously restrained its ancient rival with the aid of the law by penalizing it.

Lunatics have frequently been subjected to penal treatment. In many cases this has been due to the fact that they have been regarded as magicians, or as inhabited by evil spirits. It must be remembered, on the other hand, that lunatics have also been regarded as geniuses almost superhuman in character, or as semi-divine persons.

Prisoners of war were frequently punished in the past like common criminals. In modern times a sharp distinction has been drawn between prisoners of war and common criminals, but there is a wide range of punishments for violations of military law, some of which are even more drastic than the penalties accorded to common criminals.

Heretics have frequently been punished in the past. Various motives have prompted this punishment. Frequently the heretic has been regarded as dangerous to the community, because the deity might wreak vengeance upon the whole community for his heresies. The heretic would then fall into almost the same category as the common criminal. In other cases the sole motive or the principal motive may have been to punish the heretic for his sinfulness towards the deity. In these cases the ecclesiastical inquisitors and executioners were taking it upon themselves to assist the deity in punishing violations of the divine law.

Debtors have frequently been imprisoned in the past, either temporarily until they paid their debts, or as a punishment for their delinquency in meeting their financial obligations. Imprisonment for debt is still inflicted in some places. It occupies the twilight zone between the criminal and the civil law. It is used mainly as a means to enforce judgments under the civil law, but it still retains something of its exemplary character.

The Severity of Punishment

The preceding survey of penalties indicates that there has been a good deal of variation in the severity of punishment. Generally speaking, punishment has decreased in severity down to the present time. The broadest and most inclusive explana-

tion for this phenomenon doubtless is the gradual amelioration of the bitterness of the struggle for existence. As the conditions of life have become easier and safer, there has been less occasion for a harsh and violent reaction against those who commit anti-social acts. But this decrease in the severity of punishment has not been uniform, and there has been more or less fluctuation back and forth in its severity. The principal factors for increasing the severity of punishment probably have been the centralization of power, war, magic and religion and the ignorance they connote.

It must be remembered that in the past the world has been much more sparsely populated than at the present time. Furthermore, efficient police protection is a comparatively recent development. Consequently, it is not surprizing that the treatment of the criminal was rigorous and summary in its nature. Death, maiming, and similar forms of punishment were quick and effective methods of incapacitating the criminal from committing further offenses. Under the more unstable conditions of the past it would have been difficult to carry out long continued forms of punishment such as imprisonment.

Among primitive peoples the principal penalties probably have been death and banishment. These were drastic and summary forms of punishment. But the number of offenses to which they were applied was usually not large in the earliest communities. In these simple and democratic communities comparatively few forms of conduct seriously menaced the interests of the community from within. But as magical ideas and religious beliefs evolved, and as power came to be centralized, the number of offenses rapidly increased.

Power centralized under the chieftains of tribes, the patriarchs of family groups and village communities, priests, kings, and ruling classes. This power was used to a considerable extent for the exploitation of the remainder of the community. The penal function furnished a useful instrument for this exploitation, and, consequently, its application was greatly extended for this purpose. Magical ideas and religious beliefs have also been extensively used by priestly and royal exploiters to aid them in their predatory activities.[1]

[1] Compare the following passage from Westermarck:

"The chief explanation of the great severity of certain criminal codes lies

War also has doubtless tended to accentuate the harshness of punishment. This has been due in part to the extreme severity with which enemies are treated in war time. This severity was bound to react upon penal treatment so as to increase its rigorousness. But it has also been due to the fact that war aggravates the bitterness of the struggle for existence, and thus enhances the intensity of the selective process. Consequently, it becomes necessary for a community or a nation to extirpate with greater ruthlessness the internal as well as the external foe.

Magical ideas have led to a good deal of penal treatment. Those who have been suspected of practising black magic which is harmful to the community have almost invariably been treated with the utmost rigor. Religion has led to even more penal repression. A vast amount of punishment has been meted out in the past for alleged violations of divine law, and more or less of penal treatment today is for this purpose.

Furthermore, there has been a vast amount of persecution for religious unbelief, and heretics have frequently been treated as the most heinous of criminals. This has been due partly to the fact that heretics are presumably violating divine law in refusing to believe. But it has also been due to the fact that

in their connection with despotism or religion or both. An act which is prohibited by law may be punished, not only on account of its intrinsic character, but for the very reason that it is illegal. When the law is, from the outset, an expression of popular feelings, the severity of the penalty with which it threatens the transgressor depends, in the first place, on the public indignation evoked by the act itself, independently of the legal prohibition of it. But the case is different with laws established by despotic rulers or ascribed to divine lawgivers. Such laws have a tendency to treat criminals not only as offenders against the individuals whom they injure or against society at large, but as rebels against their sovereign or their god. Their disobedience to the will of the mighty legislator incurs, or is supposed to incur, his anger, and is, in consequence, severely resented." (E. Westermarck, *op. cit.*, Vol. I, pp. 193–194.)

See, also, E. Durkheim, *Deux lois de l'évolution pénale*, in *L'année sociologique*, Vol. IV (1899–1900), Paris, 1901, pp. 65–95.

Durkheim's two laws are the following: —

"L'intensité de la peine est d'autant plus grande que les sociétés appartiennent à un type moins élevé — et que le pouvoir central a un caractère plus absolu." (P. 65.)

"Les peines privatives de la liberté et de la liberté seule, pour des périodes de temps variables selon la gravité des crimes, tendent de plus en plus à devenir le type normal de la répression." (P. 78.)

heresies are feared on the ground that divine retribution for disbelief will be wreaked upon the community as a whole. In the third place, persecution has always been seized upon by priestly exploiters as a means to further their own ends. Whenever religion has been institutionalized, this has almost invariably happened. The most notable example of religious persecution for purposes of priestly exploitation was the Inquisition organized by the Christian Church early in Medieval times, and which lasted through the Middle Ages and in Spain persisted until after the commencement of the nineteenth century (1834).

The Inquisition

The Holy Inquisition during the six centuries of its existence caused untold suffering to its victims and their families and friends. It furnished a powerful weapon to the Church and the Papistry to aid them in maintaining and extending their ill-gotten authority. It was one of the principal forces which plunged Europe back into barbarism, and which delayed the advent of our modern Occidental civilization. It was inevitable that it should have a brutalizing effect upon all phases of life during the Middle Ages.

But the above picture, repulsive though it is, does not tell the whole story of the iniquities wrought by the Holy Office. In order to accomplish more effectively their evil ends, the inquisitors developed one of the most barbarous and most unjust methods of procedure which has ever been devized. Their proceedings were shrouded under profound secrecy, a most efficient cloak for injustice. Little opportunity was given to the accused to state his side of the case. Torture was freely used in questioning the witnesses and accused, and in extorting confessions.

If the inquisitorial procedure had been restricted to the ecclesiastical courts, it would have died with the Inquisition. But unfortunately through the canonical law it had a good deal of influence upon the secular law as well. It introduced secret inquisitorial methods and the use of torture into criminal procedure upon the Continent, and thus had a most baneful effect upon the treatment of criminals and those accused of crime.

The criminal law did not succeed in shaking off its malignant influence until after the French Revolution, and traces of its influence still remain in the criminal jurisprudence of several European countries.[1]

The Modern Humanitarian Movement

During the past century or two has come the modern humanitarian movement. This movement has, among other things, ameliorated greatly the treatment of the criminal. We can readily discern its causes if we consider the salient features of modern history.[2]

[1] See for a history of the Inquisition the monumental works of H. C. Lea, *A History of the Inquisition of the Middle Ages*, Philadelphia, 1888, 3 vols.; *A History of the Inquisition of Spain*, New York, 1906–1907, 4 vols.

For a succinct statement of the causes of the Inquisition read the first volume of the first named work, especially pages 233–242. At the close of the third volume of this work Lea characterizes the Inquisition in the following words:

"A few words will suffice to summarize the career of the mediæval Inquisition. It introduced a system of jurisprudence which infected the criminal law of all lands subjected to its influence, and rendered the administration of penal justice a cruel mockery for centuries. It furnished the Holy See with a powerful weapon in aid of political aggrandizement, it tempted secular sovereigns to imitate the example, and it prostituted the name of religion to the vilest temporal ends. It stimulated the morbid sensitiveness to doctrinal aberrations until the most trifling dissidence was capable of arousing insane fury, and of convulsing Europe from end to end. On the other hand, when atheism became fashionable in high places, its thunders were mute. Energetic only in evil, when its powers might have been used on the side of virtue, it held its hand and gave the people to understand that the only sins demanding repression were doubt as to the accuracy of the Church's knowledge of the unknown, and attendance on the Sabbat. In its long career of blood and fire, the only credit which it can claim is the suppression of the pernicious dogmas of the Cathari, and in this its agency was superfluous, for those dogmas carried in themselves the seeds of self-destruction, and might more wisely have been left to self-extinction. Thus the judgment of impartial history must be that the Inquisition was the monstrous offspring of mistaken zeal, utilized by selfish greed and lust of power to smother the higher aspirations of humanity and stimulate its baser appetites." (*A History of the Inquisition of the Middle Ages*, Vol. III, p. 650.)

[2] I have analyzed at some length the causes of the modern humanitarian movement in my *Poverty and Social Progress*, New York, 1916, Chap. XVII.

See also my article entitled *The Rise of Modern Humanitarianism*, in the *Am. Jour. of Sociology*, Vol. XXI, No. 3, November, 1915, pp. 345–359.

The modern period dates from the Renaissance, with its revival of the classic culture of ancient Greece and Rome which had long been suppressed by the Christian church and religion, and its renascence of art and learning. This renascence of learning marked the beginning of the development of modern science, which made possible the great economic changes of modern times. At the same time extensive explorations to all parts of the world were taking place, which resulted in the discovery of the Western Hemisphere and in a vast expansion of commercial relations. These explorations also resulted in the colonizing of many parts of the world by Europeans.

In the eighteenth century began the great industrial revolution, which substituted machine and factory methods of production on a large scale for the hand and domestic methods of production on a small scale of the past. This great change involved a vast extension of the principle of the division of labor within the process of production. Furthermore, with the aid of international commerce it caused a worldwide extension of the division of labor, which increased greatly the interdependence of all parts of the world.

These great changes increased enormously the productive capacity of human society. As a consequence the population of the world increased greatly. The greater density of population which resulted gave rise, among other things, to more efficient government, and therefore to better police protection. Consequently, living conditions became safer, and it was no longer necessary to treat the criminal so harshly.

Along with the expansion of the division of labor there took place a great increase in the range, facility, and rapidity of the means of communication through the steamship, railroad, telegraph, telephone, post office, press, etc. By these means the different parts of the world have been put in touch with each other, and have come to know each other to an extent which was utterly impossible in ancient times.

Last but not least, there was taking place at the same time the development of modern science, which was to a large extent the cause of the above-mentioned changes. In the nineteenth century came the theory of evolution, which showed the common origin of the entire organic world including man. When this theory was applied in anthropology, it showed that, just as there

is no absolute distinction between man and other animals, so there is no absolute distinction between the different races of men. When this theory was applied in sociology, it showed the fundamental unity in the culture which has been developing in the course of social evolution.

The significance of these great changes in relation to humanitarianism is obvious. The increasing interdependence of the different parts of the world made it more and more evident to individuals and to social groups that it was to their interest to concern themselves with the welfare of others. Furthermore, the knowledge acquired with regard to other individuals and social groups, through the means of communication described above and through science, has shown the fundamental similarity of all divisions of mankind, and has stimulated the sympathetic imagination to a high degree. These ideas and this knowledge have naturally tended in the main to stimulate the humane feelings and impulses in the relations of men and of social groups, and to inhibit the cruel feelings and impulses. So that these fundamental human traits, which have been in existence a long time, are being directed by the intelligence, under the social conditions which have evolved during the past few centuries, towards humanitarianism.

These historical facts indicate that the modern humanitarian movement has arisen out of certain human traits influenced and directed by the conditions and ideas which have become prevalent during the last few centuries. Like every great movement it is a product of social evolution in general, and can be understood only in the light of an analysis of social evolution. It is one phase of and an inevitable result from the universal world culture which is now rapidly coming into being. It has alleviated the treatment of the criminal just as it has ameliorated the condition of the poor, the sick, the insane, prisoners of war, and many other unfortunate classes.

CHAPTER XXIII

THE MORAL BASIS OF PENAL RESPONSIBILITY

The sanctions of punishment — The nature of moral phenomena — Moral concepts and social control — The theory of penal responsibility — Free will and determinism — The psychological basis of the penal function: anger; vindictiveness; fear — The doctrine of partial responsibility — Penal responsibility and the individualization of punishment.

I have already stated in Chapter III that in every social group there inevitably evolves a certain amount of control by the group. As man developed the ability to think conceptually, he attempted to justify this social control by explaining it and rationalizing it, and thus giving it a philosophic basis. In this fashion he arrived at various ethical ideas as to the responsibility of the individual to society which have served as a moral basis and sanction for punishment.

The Sanctions for Punishment

One of the earliest forms of justification for social control was the religious form. This justification was to the effect that people must be punished because they had violated the divine law. The *religious sanction* for penal treatment may therefore be called purely *punitive* and *expiatory*, in the sense that it is entirely or mainly a punishment and retribution for sin without any other purpose. This sanction for punishment still persists to a certain extent in the social consciousness and in the criminal law.

In course of time man conceived the idea that there is in the universe a more or less immutable moral law which is binding upon man. Violation of this law would then demand reparation of some sort. The *moral sanction* for punishment may therefore be called *reparatory* and *exemplary* in the sense that it makes good in some measure the breach which immoral conduct has opened in the moral law.

In recent times the idea has appeared and has acquired more

or less influence that the sole justification for rules of conduct is the interest of society in the sense that society is to be protected against conduct which is injurious to it. The *social sanction* for punishment may therefore be called *deterrent* and *preventive* in the sense that penal treatment is for the purpose of benefiting society in the future, and not to make good an injury which has already been committed and which therefore cannot be obliterated.

The religious and the moral sanctions for social control and penal treatment have been set forth and discussed in a vast mass of theological and metaphysical literature. The religious sanction is based upon animistic beliefs in the existence of supernatural beings and of a divine law. These beliefs are repudiated by many thinking persons today. There are many others who, while they do not repudiate these beliefs, do not regard it within the province of man to enforce the divine law. The moral sanction is based upon ideological speculation which has no inductive basis, and which cannot therefore be regarded as having any scientific validity.[1]

As a matter of fact, back of all of these ethical theories are the instincts and emotions which influence social relations, the habits which arise on the basis of these instincts and emotions, and the customs and public opinion which develop in every human group. An adequate analysis of moral phenomena consists largely in an intensive study of the above-mentioned mental and social phenomena. Such an analysis is now becoming possible through the development of the modern sciences of psychology, anthropology, and sociology. I shall, therefore, not traverse the arid wastes of theological and metaphysical speculation, but will make a brief analysis of moral phenomena with the aid of these sciences.

The Nature of Moral Phenomena

Moral phenomena arise primarily out of certain instincts and emotions which lead human beings to act and react upon each other either favorably or unfavorably. On the one hand are the emotion of anger and the combative instincts which it accom-

[1] Brief descriptions of these theological and metaphysical ethical theories are to be found in the writings of Lecky, Wake, Westermarck, Hobhouse, etc.

panies, the emotion of fear and the instincts which lead to efforts to destroy or remove the object which is feared or to flee from it. These traits lead to conduct which is hostile and injurious to others. On the other hand are the emotions and instincts connected with gregariousness, parenthood, and sex. These traits give rise to sympathetic feelings, and prepare the way for a sympathetic understanding of each other on the part of human beings. They lead to altruistic acts in behalf of others, and prepare the way for a humanitarian point of view. The conduct determined and controlled by these congenital instinctive and emotional traits has a moral significance because it affects for good or for ill the welfare of other members of the group.[1]

The outstanding congenital traits having moral significance, therefore, are anger and fear with the instincts which they accompany, which lead to dislike, disapproval, resentment, hatred, revenge, punishment, etc.; and the tender emotions and

[1] Westermarck asserts that "the moral concepts are based on emotions," and defines the "moral emotions" as follows:

"These emotions are of two kinds: disapproval, or indignation, and approval. They have in common characteristics which make them moral emotions, in distinction from others of a non-moral character, but at the same time both of them belong to a wider class of emotions, which I call retributive emotions. Again, they differ from each other in points which make each of them allied to certain non-moral retributive emotions, disapproval to anger and revenge, and approval to that kind of retributive kindly emotion which in its most developed form is gratitude. They may thus, on the one hand, be regarded as two distinct divisions of the moral emotions, whilst, on the other hand, disapproval, like anger and revenge, forms a sub-species of retributive kindly emotion." (E. Westermarck, *The Origin and Development of the Moral Ideas*, London, 1906, Vol. I, p. 21.)

While Westermarck is justified in pointing out the moral significance of these so-called emotions, he has failed to include the instincts which have the same significance. It should also be noted that his "moral emotions" are sentiments rather than emotions, since they are too complex to be regarded as distinct emotions.

Sutherland enumerates various sympathetic emotions which, he asserts, constitute what he erroneously calls the "moral instinct": —

"The moral instinct, therefore, is, in social animals, the result of that selective process among the emotions which tends to encourage those that are mutually helpful, and to weaken those that are mutually harmful." (A. Sutherland, *The Origin and Growth of the Moral Instinct*, London, 1898, Vol. II, p. 304.)

It is evident that Sutherland ignores the moral significance of the congenital traits that lead to conduct which is unfavorable to others.

social impulses, which lead to liking, approval, gratitude, love, altruistic and humanitarian acts, etc. These congenital traits are shared in a measure by the other higher animal species. However, it can scarcely be said that any of these animals have reached the moral plane, for it is doubtful if any animal other than man has ever made a moral judgment, that is to say, has ever consciously characterized an act as right or wrong. It was the superior excellence of the human intellect which enabled man to rationalize the conduct which arose from these congenital traits.[1]

As man developed language which enabled him to communicate with his fellows, he was forced to characterize and to try to account for his acts. So that there evolved slowly in his mind and consciousness the concepts of right and of wrong, of justice and of injustice, of rights and of duties. These concepts are now shared in some measure by all human beings, and constitute moral standards and codes, which influence human conduct materially. Consequently, we may define *conduct* having a moral significance as *human behavior which has been subjected to moral judgments.*

It goes without saying that these moral judgments have frequently been mistaken, in the sense that they have not been based upon an accurate knowledge of the facts of nature. Consequently, they have frequently done harm to mankind. But a selective process has constantly been at work in the course of which the false and harmful judgments have gradually been eliminated, and the desirable ones have been retained. This selective process has been due largely to the struggle for existence between individuals and between social groups. The conditions

[1] *Cf.* C. Darwin, *The Descent of Man and Selection in Relation to Sex*, London, 1871, Vol. I, pp. 71–73.

"The following proposition seems to me in a high degree probable — namely, that any animal whatever, endowed with well-marked social instincts, would inevitably acquire a moral sense or conscience, as soon as its intellectual powers had become as well developed, or nearly as well developed, as in man. . . . It may be well first to premise that I do not wish to maintain that any strictly social animal, if its intellectual faculties were to become as active and as highly developed as in man, would acquire exactly the same moral sense as ours. In the same manner as various animals have some sense of beauty, though they admire widely different objects, so they might have a sense of right and wrong, though led by it to follow widely different lines of conduct."

of this struggle have been determined by the environment and the stage in social evolution attained by the groups involved. In the long run, therefore, moral standards and codes are certain to be utilitarian and hedonistic.[1]

Moral Concepts and Social Control

Moral concepts have always been enforced in a measure in each social group by some means of social control. Gradually has evolved in greater richness and detail the concept of justice as including, on the one hand, the recognition and safeguarding of rights, and, on the other hand, the enforcement of duties. The penal function has evolved for the purpose of guaranteeing justice and suppressing injustice. With the organization of the political state came into being law, in the technical sense of that word. Since that time moral ideas have been recognized and embodied to a certain extent in the law. The penal division of the law has been the most drastic means of enforcing these moral ideas, and has, therefore, taken its place as the principal form of social control.

It is obvious that organized society is impossible without social control. But it is also true that an excessive amount of social control will do harm as well as the lack of it, There is always present the danger of coming to regard social control as an end instead of a means to an end. When this happens, such control is almost certain to become excessive. An excess of social control results in interfering unduly with the spontaneous expression of human nature which should be the object of civilization. Another almost inevitable result from excessive social control is that those who administer the means of control forget human beings as individuals in favor of an abstract mankind, which is meaningless. So that it is essential in studying social control to bear in mind not only the necessity for a certain amount of it, but also the danger of having too much of it.

Hence it is that in discussing the treatment of crime we should

[1] The following attempts to emancipate ethics from theological and metaphysical speculation, and to place it upon a scientific basis may be mentioned: — J. M. Guyau, *A Sketch of Morality Independent of Obligation or Sanction*, London, 1898; G. L. Duprat, *Morals: A Treatise on the Psycho-Sociological Bases of Ethics*, London, 1903. See also, in this connection, J. L. de Lanessan, *La morale des religions*, Paris, 1905.

consider not only the need for repressive measures, but also the importance of conserving the freedom of the individual as far as is compatible with the welfare of society. I have already shown how autocratic and oligarchic government and religion have frequently overstepped the bounds of justifiable social restraint upon the individual, usually in the interest of a small group, such as a royal family, a priestly class, a hereditary nobility, etc. But the same thing happens even in communities which are supposed to be democracies, either because a small group has usurped an undue amount of authority which it is using for its own benefit, or because the unthinking majority of the population of the democracy, swayed by the passions and prejudices characteristic of the mob spirit, is imposing unjust restrictions upon the minority.

The Theory of Penal Responsibility

In view of these facts it is obvious that the theory of the penal responsibility of the individual is of fundamental importance in the treatment of the criminal. In many savage and barbarous communities the responsibility for acts regarded by the community as anti-social has rested upon the group to which the guilty individual belonged, as, for example, his family or his clan. This was due to ideas with regard to blood kinship, etc., which there is not the space to discuss here. But in all probability even in these communities the individual was held responsible for his own acts within his own group. With the advent of civilization the individual came to be recognized more clearly as a distinct unit, and social responsibility for crime very largely disappeared to be replaced by individual responsibility.

Individual penal responsibility has been placed upon different bases. In accordance with the religious sanction for punishment the individual is held responsible for having violated the divine law, and thereby committing an offense against the deity who is usually regarded as his creator. In accordance with the moral sanction for punishment the individual is held responsible for having violated the absolute moral law which he is in duty bound to obey for a metaphysical reason which is too tenuous for the non-metaphysical mind to comprehend! In both of these cases there has usually been assumed a free will which gives

the individual freedom of choice to heed the divine or moral law or not as he chooses. If therefore he is guilty of the turpitude of choosing to violate the absolute law, there is every reason why he should be held responsible for the dire consequences of his acts.

In accordance with the social sanction for punishment the individual is held responsible for having injured society. In this case also a free will has frequently been assumed. Inasmuch as according to this assumption the individual is free to refrain from injuring society, he should be held responsible for doing injury to society. When he commits anti-social acts the individual has, so to speak, opened war upon society, which must defend itself against him. He must, therefore, take the consequences of his acts.

Free Will and Determinism

But the progress of science has destroyed for all practical purposes the theological and metaphysical doctrine of a free will. Scientific research has extended the concept of natural causation to all observed phenomena. Physiology, psychology, and the social sciences have extended it to human behavior.[1] So far as we can see, every human act like the acts of every living being is determined by natural causes. For example, an injury to the nervous system may have a marked effect upon the behavior which in many cases can be predicted. Disturbances of the physiological processes may have equally great effects. The mental processes are constantly being influenced by stimuli which are being received from the environment through the nervous system. The effects of different kinds of food, of poisons like alcohol and the narcotic and hypnotic drugs, of climatic and weather conditions, etc., can more or less readily be traced.

In fact, the behavior of any individual is the resultant of a complex of many factors which are comprized in the inherited structure, the traits which have been acquired as a consequence of past environment, and the immediate environment. So that we can trace in a measure how the congenital instincts and emotions are modified under the influence of the given environ-

[1] Ample evidence of the natural determination of human behavior is furnished in my *Science of Human Behavior*, New York, 1913.

ment, and how the intellect is developed and directed in the course of the life experience of the individual.

In view of these ineluctable facts with regard to the natural determination of human behavior the theological and metaphysical freedom of the will fades away into nothingness.[1] The question may then be raised as to whether there can be such a thing as individual responsibility for conduct, or indeed human responsibility of any sort. Certainly not in the theological and metaphysical sense, but it can exist in the positive, scientific sense.

While it is true that the human organism and human nature have been determined by all the forces which have acted upon them, it is also true that this organism is a complex mechanism and center of energy from which radiate stimulations and impulsions which may have far-reaching consequences. Furthermore, as an organism it is highly self-directing, more so, indeed, than any other organism. Consequently, we have every reason to regard the human organism as an efficient cause of the deeds which emanate from it, and the consequences of those deeds. In this positive and scientific sense, then, we may regard the individual as reponsible for his conduct.

But the above-mentioned responsibility is much broader than moral responsibility, while penal responsibility is ordinarily even more limited than moral responsibility. In every punitive system the extent and nature of penal responsibility has depended not only upon the prevailing conception of the human will, but also upon the recognized objects and purposes of penal treatment. Furthermore, in the theological and metaphysical systems exceptions had to be made on account of certain obvious features of human nature, however inconsistent these exceptions may have been with the theological and metaphysical theories.

I have already stated that according to the religious sanction for penal treatment the object of punishment is punitive and expiatory, according to the moral sanction it is reparatory and exemplary, and according to the social sanction it is preventive and deterrent. But in practise these objects have been

[1] See, for a detailed criticism of the doctrine of free will and an exposition of the theory of determinism as applied to penal responsibility, R. M. McConnell, *Criminal Responsibility and Social Constraint*, New York, 1912.

more or less mingled, whatever the alleged sanction might be. Punishment with a religious or moral sanction has frequently been regarded by those administering it as being deterrent and preventive as well. Punishment with a social sanction has sometimes been regarded as punitive and exemplary as well.

The Psychological Basis of the Penal Function

The reason for this mingling of the objects of punishment is that back of all of these sanctions are the fundamental human traits which give rise to social reaction against offenders. They are the emotions of anger and fear with the instincts which they accompany. Anger furnishes a basis for vindictiveness, which leads to acts of vengeance. This constituent element in punishment is most fully exemplified in the religious sanction. While the purpose of this sanction is alleged to be punishment and expiation for violations of the divine law, it is in reality a more or less unconscious expression of the vengeful spirit in man which appears here in a theological guise. So that while man has been punishing in the name of a deity, he has been giving vent to his own hateful feelings. Unfortunately this religious sanction for some of the most dangerous and unruly traits in human nature has consecrated and reënforced them in such a fashion as to increase greatly the amount of sternness and cruelty in human relations. This influence of religion has manifested itself in brutal treatment of criminals, in religious persecution, in innumerable wars, in slavery, in neglect of the sufferings of the sick and the poor, etc.

Fear gives rise to impulses to remove, to flee from, and sometimes to destroy the feared object. This constituent element in penal treatment is most fully exemplified in the social sanction. It is fear that gives the initial dynamic impulse to the desire to remove or destroy the persons who commit what are regarded as harmful deeds, and to prevent others from committing similar deeds. So that the deterrent and preventive motives for penal treatment doubtless arise on a basis of fear.

Now anger and fear are closely connected in the mental makeup. Fear is very likely to lead to anger, and thus to add vengeance to the deterrent and preventive motives for punishment. Fear is in itself an unruly trait which is liable to assume

an exaggerated form, and thus to stampede its subject into hasty and foolish acts. It is, therefore, doubly unfortunate that it should be reënforced by anger. The consequence frequently is that penal treatment is carried far beyond the needs of social defense against anti-social acts, and sometimes does more harm than good.

It is evident, therefore, how important it is to rationalize punishment, and to put these unruly emotions as much as possible under the guidance and control of the intellect. But it cannot be said that the penal sanctions I have described have done so successfully. At any rate, this is obviously true of the religious sanction. In the first place, there is grave question as to the existence of the deity and the divine law upon which this sanction is postulated. In the second place, even if we assume their existence, it is far from certain that man is sufficiently acquainted with the divine law or has the ability to enforce it. Consequently, the religious sanction is a very questionable and unstable basis for so important a function as the protection of society against anti-social acts.

Much the same can be said of the moral sanction for penal treatment which is postulated upon the existence of an absolute moral law. After all, this is merely a somewhat more philosophic statement of the theological theory. It may lend itself a little more readily to the purpose of protecting society against harmful conduct. But neither the theological nor the metaphysical theory is adequate or suitable for an effective program of deterrence and prevention against crime.

The social sanction is the most successful in rationalizing the penal function. It is not based upon any uncertain and probably mythical divine or absolute moral laws. It contemplates no indefinable and unknowable transcendental objects to be attained, but is limited to purely human and social interests. It is relative and inductive in its methods, and therefore lends itself readily to pragmatic and hedonistic ends.

But those who have advocated and expounded the social sanction for punishment up to the present time have not understood clearly the mental mechanism which is back of the penal function. They have probably not realized fully, and sometimes not at all, the extent to which the motives of deterrence and prevention arise out of the emotion of fear. Consequently, they

have not recognized frequently that this emotion is liable to run away, so to speak, with the penal function, and to lead to foolish and excessive uses of it. Furthermore, they have usually not realized at all that anger is almost inevitably a resultant from, or, to say the least, an accompaniment of fear, and therefore must always be borne in mind and reckoned with as an element in punishment.

The exponents of the social sanction for penal treatment have been inspired by the legitimate and laudable desire to adapt and adjust the penal function as directly as possible to useful human and social ends. They have recognized that such emotions as anger and fear are irrational in the sense that they are not intellectual phenomena, and their tendency has been to ignore them. They have failed to realize that however unreasonable and harmful these emotions frequently are, they are inextricable traits in human nature which must always be reckoned with.

The wise policy therefore is not to forget these emotions but to remember them, and to endeavor to direct and control them as best we may by means of the intellect. This can be accomplished by two principal means. In the first place, a social organization should be developed which will put effective checks upon the expression of these emotions. In the second place, there should be disseminated by educational and other means certain ideas which will give to the young as they approach maturity an understanding of these affective traits, and will aid each generation to direct and control these emotions wisely.

Let us now apply these fundamental principles and concepts to the idea of punishment in order to determine its nature and limits, and also in order to ascertain the nature and extent of the penal responsibility of the individual. It is obvious that the concepts of punishment and of penal responsibility are basic to criminal law and procedure and to all forms of penal treatment, and it is therefore of the utmost importance to define these concepts as clearly as possible.

In the first place, the law must enumerate the acts which are to be stigmatized as criminal. Some of these acts are obvious, such as those which endanger the person with death or physical injury. Other acts endanger the established social institutions, such as the right of private property, marriage, etc. The jus-

tification for the prohibitions in the second group depends upon the value of these institutions.

But there is reason to believe that many prohibitions are imposed out of fear of what is new, or, at any rate, what is new in the experience of the individual. It is difficult for the human mind to adjust itself to things to which it is not accustomed. Conservatism and social conventions are due to this mental trait. Consequently, sumptuary legislation and other laws repressing unconventional conduct come into being.

Fear is, therefore, both useful and harmful. It is useful in so far as it guards against forms of conduct which are unquestionably injurious to mankind. Furthermore, it acts as a check upon changes which may not prove to be desirable. But, on the other hand, it stands in the way of many changes which will prove to be beneficial, and thus impedes social progress. Furthermore, it prevents the highest possible degree of free activity on the part of human beings, and thus hinders the spontaneous expression of human nature which should be the principal object of civilization and of human culture in general.[1]

When we turn to the reaction against the criminal offender, we find the situation complicated by the emotion of anger. It is probably inevitable that feelings of resentment if not of hatred are manifested towards the person guilty of conduct which is regarded as harmful. As a consequence of these feelings there is sure to be an element of vengeance in punishment. As I have stated in Chapter II, in the early stages of culture this feeling displayed itself not only against human beings, but also against animals and even inanimate things. But when man came to understand more clearly the causation of events in the world, he realized that no purposive harm could be done to him by inanimate things, and rarely if ever by animals.

The Doctrine of Partial Responsibility

Consequently man came to limit the concept of moral and penal responsibility to human beings. But in course of time he recognized that this responsibility was limited even with

[1] I have outlined this object of civilization in the last chapter of my *Poverty and Social Progress*, New York, 1916, entitled "Social Progress and the Coming of the Normal Life."

respect to certain groups of human beings. This recognition was due to a perception of the obvious fact that these human beings were laboring under an intellectual disability which rendered them incapable of comprehending the nature of their acts, and therefore of doing harm purposely. In this fashion arose the theory of the partial or complete irresponsibility of the young, of imbeciles, of lunatics, of intoxicated persons, etc.

This theory was, of course, totally inconsistent with the belief in a free will, for if the will is indeed free it must be independent of merely material conditions, and could not be influenced by such inconsequential matters as physical and mental immaturity, an undeveloped or deranged nervous system, an organism poisoned by alcohol, drugs, etc., and other unimportant physical conditions over which the spirit should ride triumphant. But for once common sense conquered theological dogmatism and metaphysical ideology, and now theology and metaphysics are trying to patch things up by means of an absurd doctrine of a limited free will, whatever that contradiction in words and ideas may be.

The appearance of the doctrine of a limited moral and penal responsibility for some human beings is of great significance. It indicates that the spirit of vengeance can be guided and controlled to a certain extent when enlightened by the intellect. It furnishes hope that this intellectual guidance and control will become much greater in the future. It would become most powerful if men could attain a clear understanding of the theory of determinism, and would apply this theory consistently in the treatment of the criminal. Criminals would then be punished in accordance with their individual traits and in order to attain the socially useful ends of punishment, by removing the offender from society, by reforming his character, or in some other way.

But it will probably always be impossible to eliminate vengeance entirely from penal treatment. Indeed, some writers contend that this spirit of vengeance has great utility, and therefore should not be eliminated. Their theory is that the resentment and hatred felt towards the criminals gives rise to an emotional reaction which stimulates and enhances the moral indignation felt towards the evil acts of the criminals. Thus the offenders are made to personify in a measure in the public mind the hatefulness of their acts, and without this concrete per-

sonification the public indignation towards evil conduct would not be as great as it should be.[1]

There is doubtless a measure of truth in this theory. But it is highly probable that the spirit of vengeance will always be strong enough to perform this useful function without any artificial encouragement. Indeed, the usual if not the constant danger is that this spirit will be too strong, and will not subject itself sufficiently to the guidance of the intellect.

We can now see both the utility and the dangers of the emotions of fear and of anger for the penal function. These emotions doubtless evolved because of their great value for the preservation of the individual in the struggle for existence. They are now furnishing much of the dynamic impulse for the measures being used for the protection and preservation of society. But they need to be curbed and rationalized by the intellect. Otherwise there is always the danger of their sinking to the level of lynch law.

If the degree of punishment to be inflicted was to be determined solely by the feeling of vengeance aroused by the offense, the amount of punishment meted out would be measured presumably by the heinousness of the act. But even under the religious and moral sanctions the penal responsibility of some individuals has been regarded as limited, and, consequently, their penalties have been more or less attenuated. This was doubtless due in part to the fact that kindly feelings in behalf

[1] Among the writers who have expounded this theory are A. Shaftesbury, *Characteristicks*, London, 1733, Vol. II; J. F. Stephen, *A History of the Criminal Law of England*, London, 1883, Vol. II; E. Durkheim, *De la division du travail social*, 2d ed., Paris, 1902. Westermarck has stated the theory recently in the following words: —

"Whether its voice inspire fear or not, whether it wake up a sleeping conscience or not, punishment, at all events, tells people in plain terms what, in the opinion of the society, they ought not to do. It gives the multitude a severe lesson in public morality; and it is difficult to see how quite the same effect could be attained by any other method. Retaliation is such a spontaneous expression of indignation, that people would hardly realise the offensiveness of an act which evokes no signs of resentment. Of course, punishment, in the legal sense of the term, is only one form — the most concrete form — of public retaliation; it is, indeed, probable that public opinion exercises a greater influence on men than punishment would do without its aid. But punishment, in combination with public opinion, has no doubt to some extent an educating, and not merely a deterring, influence upon the members of a society." (E. Westermarck, *op. cit.*, Vol. I, p. 90.)

of certain offenders were aroused in the witnesses, and sometimes even in the victims of their offenses. For example, on account of their youth compassion would be aroused in behalf of young offenders. Sympathetic feelings would arise in behalf of offenders who committed their acts under the stress of peculiar circumstances, such as the influence of a strong passion.

Furthermore, as the causes of human conduct came to be understood more clearly, the moral and penal responsibility of certain groups was lessened on the ground that they were incapable of comprehending the nature of their acts, and therefore could not intend to commit wrong. So that the responsibility of the young, the feebleminded, the insane, etc., came to be limited.

Penal Responsibility and the Individualization of Punishment

In this book I have described the physical and mental traits of criminals, and the economic, political and other factors which influence their conduct. I have shown the high degree of variation between the traits and conditions which determine the conduct of different criminals, even when their acts are similar. These facts indicate the wisdom of treating each criminal with due regard to his peculiar traits and conditions, and not treating all criminals alike. In fact, the modern scientific study of the criminal and the causes of crime has resulted in the enunciation of a new fundamental principle of penal treatment, namely, the principle of the individualization of punishment.

One of the most difficult of the criminological problems of today is to adjust to each other and to harmonize the theory of penal responsibility and the principle of the individualization of punishment.[1] Penal responsibility in the past has been based in the main upon the notion of a free will which is in theory the same for all, though, as is pointed out above, various exceptions arose in practise. The modern principle of individualization is based upon the ascertained facts with regard to the

[1] I have discussed the theory of penal responsibility and the principle of the individualization of punishment at greater length in my book entitled *The Principles of Anthropology and Sociology in Their Relations to Criminal Procedure*, New York, 1908, especially Chapters III, IV, and V.

extensive intellectual and volitional differences between individual offenders.

Now if penal responsibility is based upon the social sanction for punishment, it is essential to take cognizance of these facts, inasmuch as according to this sanction the purpose of punishment is the defense of society against anti-social acts. The application of the principle of individualization makes this social defense much more effective, because it adds to the methods of elimination and restraint the method of reformation. At the same time, the inevitability and the slight utility of the spirit of vengeance will doubtless always place a limit upon the extent to which punishment can be individualized.

These problems with respect to the theory of penal responsibility and the principle of the individualization of punishment will be discussed in the following chapter. I shall show that a positive basis for penal responsibility is possible in imputing crime to the traits of the individual, and that this positive criterion of penal responsibility permits of a large measure of individualization.

CHAPTER XXIV

THE SENTENCE AND THE INDIVIDUALIZATION OF PUNISHMENT

The fundamental principle of modern criminal law — The types of individualization: legal; judicial; administrative — The criteria of individualization: the crime; the criminal; social conditions; the origin, type, and intensity of the criminality — Limitations upon individualization — The indefinite sentence — Suspension of sentence and probation — The penal treatment of the young: the juvenile court — Judicial and administrative individualization: rehabilitation; periodical revision of sentences.

THE accused having been tried and found guilty, it becomes incumbent upon the court to impose sentence. In the following chapters will be described the death penalty, imprisonment, and other forms of punishment. At present we shall consider the principles which should guide courts in deciding upon appropriate penal treatment for those convicted.

In recent years there has been a strong tendency to adjust the treatment of the criminal to his character rather than to the nature of his crime. This method has come to be known as the *individualization of punishment.* In the United States has originated the indeterminate, or rather the indefinite, sentence, according to which the duration of punishment of criminals guilty of the same crime may vary greatly from one criminal to another. The system of fixed penalties still obtains almost everywhere in Europe, but the device of recognizing extenuating circumstances has been introduced to temper the rigidity of this system. In this country also originated suspension of sentence with probation or parole, which has been copied in England under the name of *conditional release* and in France under the name of *condamnation conditionelle* or *sursis*, and which now exists in many other countries.

Previous to the French Revolution upon the European Continent the fixation of the penalty was largely in the hands of the judge. Furthermore, the judge frequently had considerable

authority in deciding what acts are criminal. This was a dangerous power in the hands of judges, and was frequently misused in the interests of despots and oligarchies. It called forth a vigorous protest from the eighteenth century philosophers whose ideas formed the basis of the French penal code which was formulated soon after the Revolution. The arbitrary power of judges had already come to be limited in England by parliamentary government.

The Fundamental Principle of Modern Criminal Law

The fundamental principle of modern criminal law is expressed in the famous axiom, "*nullum crimen, nulla pœna sine lege*," or, as it is sometimes worded, "*nulla pœna sine lege criminali.*" This axiom means that no one can be prosecuted for an act which has not been made a crime by law before its commission. This principle was recognized in 1787 in the section of the American Constitution forbidding *ex post facto* legislation. It was applied by the French National Assembly immediately after the beginning of the Revolution in the famous declaration of rights of August 26, 1789, and again in the law of January 21, 1790, which is the basis of French penal legislation. It is recognized and safeguarded in all modern constitutional and statutory legislation.

Modern civilization can never again tolerate judges who are responsible only to a monarch, or oligarchy, or aristocratic class, or, as the ecclesiastical judges claimed, responsible only to God. The power of the judge must be legal. That is to say, it must be conferred upon him by a law created by the people, or enacted by a legislature which represents the people. The judge thereby becomes responsible to the people from whom he derives his power. So that this principle is an important democratic principle which must always be safeguarded as a protection against autocracy and tyranny.

In accordance with this principle the legislative power must always specify which acts are criminal. Otherwise social defense against crime would become no more than the expression of the private standard of morality of the judge, or of the monarchical or oligarchical authority which he represents. Furthermore, the police would not know against what acts to take action as being criminal.

But the practical application of the second part of the above-mentioned axiom, namely, "*nulla pœna sine lege*," may vary somewhat. The penal code adopted after the French Revolution reacted against the arbitrary power of the judges by fixing absolutely the penalty for each crime. But this code was not successful, because the jury insisted upon giving its verdicts in accordance with the penalties they would entail. Consequently, the jury was permitted to recognize extenuating circumstances, and the penalty was no longer absolutely fixed by the law. However, the individualization of punishment does not mean that the fundamental principle of modern criminal law is to be denied. Punishment cannot and ought not to be inflicted under any circumstances which have not been foreseen by the law. But this principle does not require that the law shall specify beforehand the exact amount and character of the penalty in each individual case.

The Types of Individualization

In the United States the idea of reforming the criminal has been prominent. It resulted in the early part of the nineteenth century in experiments in the construction and administration of penitentiaries which attracted the attention of Europe. Later the indeterminate sentence, suspension of sentence, probation, etc., were introduced. These changes were stimulated mainly by private initiative, and have been put into effect largely by private agencies. They have been inspired partly by philanthropic and humanitarian ideas, and partly by a religious zeal for the moral regeneration and religious conversion of the criminals. In the latter respect this kind of individualization is like that of the canonical law of the dark and middle ages as practised in the ecclesiastical courts. The judges of these courts believed that justice is in the hands of God, and they had not the objective aim of adjusting the punishment to the crime committed, but the subjective aim of working for the regeneration of the criminal.

The general tendency of these American modifications has been towards leniency. Rarely, if ever, has greater severity of treatment been advocated. Since emphasis has been laid principally on the criminal himself, these changes have been developing a sort of individualization. But it has not been inspired by

science, and has, therefore, not been controlled by scientific principles. Since little or no study of the criminal has been made in this country, it has been almost if not quite as empirical as the individualization made by the jury by means of the recognition of extenuating circumstances. The aim of social defense has been rather vaguely conceived, and has, therefore, had little influence, as has been shown by the almost universal tendency towards leniency.

Three kinds of individualization have been distinguished, namely, legal, judicial, and administrative. Strictly speaking, there can be no such thing as legal individualization. The legislator does not know the person for whom he is legislating, and therefore cannot adapt the penal treatment to this particular individual. The term has been applied to laws which furnish a basis and provide for individualization of other kinds, as, for example, a legal classification of criminals according to their types. But in order that this law may be applied to the individual criminal, the intervention of another agency is needed. Judicial individualization is exercized in the course of criminal procedure, during which the character of the criminal is diagnosed and appropriate penal treatment is prescribed. Administrative individualization is effected by the penal administration in the course of the penal treatment.

The Criteria of Individualization

A criterion is needed for judging the character of the criminal. The criminal act is an uncertain and insufficient indication. The motive of the act is superior to the act as a criterion, because it is subjective in its character. In the case of some crimes of the most heinous sort the motive is adequate evidence of the character of the criminal. But most cases are not so easy to decide. There is usually the practical difficulty of ascertaining the motive. Inasmuch as this is an intangible thing, and is not always revealed by the circumstantial evidence, it frequently remains in obscurity.

An individual not at all criminal in character may at times commit a crime with a bad motive. On the other hand, a person of a criminal character may commit a crime with a good motive, but the crime may be such as could be committed only by an

individual of criminal character, so that in such a case the act might in reality be a better indication of character than the motive. Like the act itself, the motive usually reveals only a small part of the personality during a limited period of time. It is an indication of character, and may serve as a presumption on which to base further investigation, but it is not a broad enough basis upon which to decide the penal treatment to be prescribed.

In accordance with the principle of social defense against crime, the sanction for punishment is the dangerousness of the criminal to society. The criterion of judgment is threefold, including the crime, social conditions, and the criminal. In developing a criterion of penal responsibility the whole human personality must be taken into account, including the instincts, the emotions, the intellect, etc. The same is true of individualization. No more than penal responsibility can it be based upon a single element of the personality. We must, therefore, consider by what means a knowledge of the personality of the criminal can be secured.

The criminal act and its motive, so far as the motive can be ascertained, have been mentioned. Then there is the life history of the criminal, revealing his previous criminal record, if he has any such record, his education, his vocation, his manner of life, etc. In the last place, there are the facts that may be learned by means of a physiological and psychological examination. The fact that the offender is a professional or an occasional criminal, is feebleminded or insane, is a neurasthenic or an epileptic, is a significant indication of the kind of penal treatment needed.

Having gathered this information about the personality of the criminal, in what ways can it be used in determining his penal treatment? His criminality must be studied from several points of view, namely, from that of its *origin*, of its *type*, and of its *intensity*. From no one of these points of view alone can the penal treatment be determined, but all must be considered before a satisfactory decision can be reached.

In the first place, the origin of the criminality is a very important piece of evidence, whenever it can be ascertained, and should influence the penal treatment greatly. The fact as to whether the criminality is congenital or acquired, whether it is nervous or anatomical in its origin, may cause great variations in the treatment applied. At the same time, two forms of

criminality with different origins sometimes require the same kind of treatment, as, for example, when it is a question of total elimination, the same kind of elimination will serve for criminalities having very different origins.

In the second place, the type of the criminality, or the kind of crime in which it results, must be considered. The criminals may be classified to a certain extent according to their types of criminality, with appropriate penalties for each type. But this system is not certain to be accurate, because two criminals displaying the same type of criminality may have different origins, and therefore require different methods of treatment. For example, two burglars may have become criminals for entirely different reasons, and it would be absurd to treat all burglars alike. On the other hand, criminals of the same origin may commit different kinds of crime, and yet require the same kind of treatment, on account of their similar origin.

In the third place, the intensity of the criminality must be considered, namely, as to whether it is profound, and therefore incorrigible, or superficial and temporary, and therefore reformable. If it is incorrigible, measures of surety, such as permanent incarceration, may be required. If it is temporary, measures of intimidation, or of reformation, may be needed.

These three points of view are by no means independent of each other, but, on the contrary, overlap more or less. It is true that criminalities of the same origin, or of the same type, usually need the same kind of treatment, and to a less degree that is also true of criminalities of the same intensity. But all three must be considered before penal treatment can be prescribed accurately.

Limitations upon Individualization

There is a practical limit to the extent to which the individualization of punishment can be carried. For financial reasons, if for no other, it would be impossible to prescribe special treatment for each of the many thousands who are constantly passing through the courts, while such a high degree of individualization would, as a rule, have no utility. It is, therefore, necessary to establish a more or less detailed classification based upon the three points of view designated above. The individualizing

would then consist in determining the class of each criminal. Such a classification should be developed out of the experience of the courts and of the penal administration, an experience tested and controlled by statistics of recidivism and of the extent of crime.

Furthermore, it would be dangerous to individual rights and personal liberty if unlimited powers of individualization were put into the hands of the courts and penal administration. However efficient these may become, errors will always be possible. Ordinarily these errors will be unintentional. In some cases political reasons may lead judicial and administrative officials to incarcerate indefinitely persons who are objectionable to them. Consequently, maximum limits should always be placed upon the powers of these officials, and rights of appeal should always be maintained. However desirable individualization of punishment may be for penological reasons, it would not be worth while to risk endangering fundamental democratic principles for this reason. Excessive enthusiasm for the principle of individualization on the part of reformers is likely to give rise to this danger, especially when they are ignorant of the history of the evolution of human liberty and personal rights.

There is also a serious objection to individualization which indicates a further limitation upon the application of this principle. To many persons it appears as if individualization causes great injustice, because it results in an inequality of punishment for equal crimes. Consequently, there is danger that criminal justice will be discredited in the eyes of the public, and measures should be taken to avert this danger.

It is probable that criminals sometimes feel that they are being treated unjustly when others who have been guilty of the same crime receive a lighter penalty. This can be obviated in part by the merit system in the penal institutions. A criminal should be made to feel that the severity and duration of his punishment depends largely upon himself, and that others are released with less punishment because they have earned more lenient treatment. But it might also be desirable if, on the occasion of every sentence, the judge would state publicly the reasons for the sentence, thus indicating its justice both to the criminals and to the non-criminal public. In this fashion both the criminals and the public at large might, in course of time,

be educated up to the point of appreciating the justice of individualizing punishment.

From the point of view of social defense against crime, justice does not require that the same crimes shall always receive the same punishment. Justice both to society and to the individual frequently requires that the punishment shall vary greatly in cases where the crime has been exactly identical. So that the alleged injustice of individualizing punishment is in part nonexistent. However, the criterion of judgment is threefold, including the crime and social conditions as well as the criminal. To forget these two considerations, and to individualize with only the criminal in mind, would be to ignore the purpose of social defense.

There undoubtedly exists in the public consciousness a desire to punish crimes according to a graduated scale of severity. It has been suggested above that the public may be educated up to the point of accepting individualization without demanding punishment for the crime. However, it is doubtful if the public can ever be induced to accept thoroughgoing individualization. Furthermore, the public demand for a graduation of penalties according to the gravity of the crimes has some social justification which must be recognized.

I have shown in the preceding chapter that the original sources of punishment are the powerful emotions of fear and of anger. These emotions are prone to lead the individual and society to acts of excess in repressing the objects towards which these emotions are directed, and therefore are in need of regulation and restraint. The principle of individualization should furnish one of the methods of regulating the punitive manifestations of these emotions. But it will always be necessary to permit public vengeance, as manifested through the penal law, to stigmatize the graver crimes effectively by attaching heavier penalties to them. Thus will these crimes be made to appear more odious even to those who have no thought of committing them, and the standard of public morality can thereby be raised. In this fashion the public can display its displeasure against dangerous anti-social conduct as personified by the criminals who commit these acts.

It is evident, therefore, that the principle of individualization must be adjusted to the need for indicating the relative

gravity of crimes. This is not an easy task, and can be accomplished only through extensive experience. Crimes may be graded according to their gravity in the penal code. But this is not a sufficiently concrete and tangible mode of gradation, so that they must also be graded according to the kind or the duration of the penalties inflicted upon them.

The Indefinite Sentence

The indefinite sentence, frequently miscalled the "indeterminate" sentence, combines in a measure the principle of individualization and a recognition of the gravity of the crime. So far as I know, a purely indeterminate sentence has never been put into effect. That is to say, a law providing for an entirely indeterminate sentence has never been enacted. But many laws have been enacted providing for a partially indeterminate or indefinite sentence, in which a maximum and sometimes a minimum limit for the duration of the sentence is specified. The first law of this nature was enacted in the State of New York, April 24, 1877, and provided for the release on parole of prisoners from Elmira Reformatory, before the end of their term of imprisonment. Such a law is absolutely necessary for a reformatory system. Similar laws have since been enacted in various other states and countries for reformatories. The principle of the indefinite sentence has also been extended to imprisonment in other kinds of penal institutions, so that sentences to penitentiaries are frequently not absolutely fixed, but vary between a minimum and a maximum.

One of the principal traits of the indefinite sentence is the appeal it makes to the self interest of the criminal. In the reformatories the release is determined mainly by the progress the inmate makes in learning a trade, and in his school work. In the penitentiaries the release is determined in the main by the conduct of the prisoner, a record of which is kept by means of marks and a system of grading. It is questionable if this is a good criterion of the fitness of the criminal to be liberated. The worst of criminals frequently display the best conduct in the prisons. The criterion for liberation should rather be the character of the criminal, and the reformatory system is much more likely to judge criminal character aright.

The decision as to the duration of the sentence within the limits imposed by law is made in many reformatories and other penal institutions by a parole board composed in part or entirely of persons outside of the prison management. By placing this power outside of the prison administration a check is placed upon its work, thus answering the criticism sometimes made of the indefinite sentence that it puts too much power in the hands of the prison keeper. It is probable also that in some if not in many cases the power of releasing from the penal institutions should be given to the judges who have imposed the sentences, and who could exercize this power by means of the periodical revision of sentences.

In view of the limitations upon the principle of individualization which have been described above, it is evident that an indeterminate sentence is out of the question. It would indeed be incompatible with democratic principles to put an unrestricted power of incarcerating for an indefinite period in the case of most crimes in the hands of a single person or group of persons. In Europe it took several centuries of struggle to deprive the judges who represented autocracies and oligarchies of this power. The Europeans, therefore, display a wholesome fear of the indeterminate sentence.[1] In this country, unfortunately, there are some prison reformers who, lacking an historical background and an acquaintance with fundamental political principles, have advocated an indeterminate sentence, and have in some cases succeeded in securing an indefinite sentence which is too extended in its scope.[2]

[1] It is interesting to note that at the International Prison Congress at Washington in 1910 the European delegates opposed vigorously the principle of the indeterminate sentence, and even displayed some hostility to the indefinite sentence.

[2] An illustration of such an indefinite sentence is to be found in a law enacted in New York State in 1915. This law provides for a parole commission in each of the first class cities (New York, Buffalo, and Rochester) in the state. The commission is to consist of three members appointed by the mayor, the commissioner of correction, ex officio, and the commissioner of police, ex officio. This commission is to have jurisdiction over the release of prisoners from the workhouses, penitentiaries, and reformatories administered by these cities. The great majority of the inmates of these penal institutions have been convicted of misdemeanors. The severest penalty imposed for a misdemeanor in the New York State Penal Code is one year's

But a considerable amount of individualizing can be accomplished between the limits of the indefinite sentence, while the relative gravity of the various offenses can be recognized and indicated by the maximum limits of their respective penal-

imprisonment and a fine of five hundred dollars. In spite of this fact, the parole commission can keep an inmate in the penitentiary for three years, and in the workhouse for two years for certain offenses.

"The duration of the commitment of any person to the penitentiary shall not be fixed or limited by the court in imposing sentence, except that the term of such imprisonment in the said institution shall not exceed three years, and such imprisonment shall be terminated as prescribed in section five of this act. The duration of the commitment of any person to a workhouse shall be for a definite period not to exceed six months, provided, however, that if it shall become known to the court through competent evidence at any stage of the proceeding prior to the imposition of sentence that any person convicted of vagrancy, disorderly conduct tending to a breach of the peace, public prostitution, soliciting on streets or public places for the purposes of prostitution, or frequenting disorderly houses, or a house of prostitution, of the violation of section one hundred and fifty of chapter ninety-nine of the laws of nineteen hundred and nine, as amended, has been convicted of any or each of these offenses two or more times during the twenty-four months just previous, or three or more times previous to that conviction, then the court shall commit such offender to a workhouse, of the said department of correction in said city for an indeterminate period which shall not exceed two years." (*Laws of New York*, 1915, Chap. 579, Section 4.)

According to the annual report of the Department of Correction of New York City for 1915, there were in the Penitentiary of that city during that year 84 inmates for disorderly conduct, 129 for disorderly house keeping, 248 for intoxication, 935 for petit larceny, 382 for vagrancy, etc. In other words, there were several thousand inmates guilty only of minor offenses who could be kept in prison for three years at the discretion of the parole commission. During the same year there were in the City Workhouse over twelve thousand inmates guilty of the six petty offenses mentioned in the law, for committing which offenses two, or three, or more times the parole commission could keep them in prison for two years. It is unwise to impose absolutely fixed penalties upon these offenders, many of whom are not in the least benefited by imprisonment. But it is unjust and dangerous to place the power of keeping these petty offenders in prison for two or three years in the hands of a parole commission representing solely the mayor. This would indeed be an easy method of "railroading" to prison opponents of the city administration, or political offenders. Even if this should never happen, it is grossly unjust to these petty offenders who have no recourse from the decisions of the commission, and no protection, except that magistrates and judges who commit to the workhouse and reformatory may sit with the parole commission when it is considering the eligibility for parole of persons sentenced by them.

ties.[1] Furthermore, recidivism should be recognized by the law as an aggravating circumstance, and the penalty should be increased accordingly, thus enlarging the opportunity for individualization.[2]

Suspension of Sentence and Probation

Another recent modification of criminal procedure which increases somewhat the scope of individualization is the suspension of sentence, which releases a criminal from punishment on condition of good behavior in the future. Like the indefinite sentence, this reform originated in the United States. It was first introduced for juvenile criminals under the name of probation in Massachusetts in 1869, and for adults in Boston in 1878. Since then it has been adopted in many states. In England the "Probation of First Offenders Act" was enacted in 1887. It is also known as *conditional release* in England. But this is a misleading name because it may be confused with the conditional liberation of criminals who have served a term of imprisonment. It was first introduced upon the continent in Belgium by the

[1] In New York State the so-called "indeterminate" sentence law for state prisons reads as follows: —

"A person never before convicted of a crime punishable by imprisonment in a state prison, who is convicted in any court in this state of a felony other than murder first or second degree, and sentenced to a prison, shall be sentenced thereto under an indeterminate sentence, the minimum of which shall not be less than one year, or in case a minimum is fixed by law, not less than such minimum; otherwise, the minimum of such sentence shall not be more than one-half the longest period and the maximum shall not be more than the longest period fixed by law for which the crime is punishable of which the offender is convicted. The maximum limit of such sentence shall be so fixed as to expire during either of the following months: April, May, June, July, August, September and October." (*N. Y. Penal Code*, 1915, Section 2189.)

[2] In New York State the law recognizes the following persons as habitual criminals: —

"Where a person is hereafter convicted of a felony, who has been, before that conviction, convicted in this state, of any other crime, or where a person is hereafter convicted of a misdemeanor who has been already five times convicted in this state of a misdemeanor, he may be adjudged by the court, in addition to any other punishment inflicted upon him, to be an habitual criminal." (*N. Y. Penal Code*, 1915, Section 1020.)

According to the Code, an habitual criminal is subject to special supervision of the local authorities even when he is at liberty.

Le Jeune law enacted in 1888, and was adopted in France by means of the Berenger law which was enacted in 1891. In Belgium and France it is known under the name of *condamnation conditionelle* or *sursis*. Since that time it has been adopted in several other European countries, such as Portugal, Norway, Luxemburg, etc.

In this country the power of suspending sentences, which judges under the common law could do temporarily,[1] has been greatly extended in some states, as, for example, in New York.[2] But several precautions are taken against the abuse of this privilege by the criminals. The sentence is suspended only on condition of good behavior, and may be imposed later if the criminal misbehaves. If a judge has reason to believe that a criminal whose sentence has been suspended is not leading an honorable and useful life, he can summon the criminal to court and inflict the penalty originally suspended. Furthermore, if the criminal is convicted of another crime, the original penalty can be inflicted in addition to the penalty for the new crime, for which he is treated as a recidivist. Another precaution is the work of the probation officer in whose custody the criminal is usually placed, and who watches over him for a time after his release.

In England, no surveillance is maintained over the criminal after he is released on condition, but he is required to give bond for good conduct. A similar system exists in Massachusetts, where the probation officer has to act as surety for the good conduct of the criminal, thus stimulating the vigilance of the officer.

[1] In a recent decision of the Supreme Court of the United States (*Ex parte United States, Petitioner*, 37 Sup. Ct. 72) the Chief Justice declared that under the common law a judge could only stay the execution of a sentence temporarily, until an appeal in behalf of the convicted person could be made to the Crown. (See *Central Law Journal*, Feb. 2, 1917.)

[2] When a court must pass sentence "such court may in its discretion suspend sentence, during the good behavior of the person convicted, where the maximum term of imprisonment prescribed by law does not exceed ten years and such person has never been convicted of a felony. Courts of special sessions are empowered to suspend sentence and at any time within the longest period for which the defendant might have been sentenced, may issue process for the re-arrest of the defendant, and when arraigned the court as it is then constituted may proceed to enter judgment and impose sentence." (*N. Y. Penal Code*, 1915, Section 2188.)

On the European Continent, no surveillance is exercized, and there is no bond for good conduct. The suspension of sentence is sacrificed only in case of a new crime. But, on the other hand, the power of suspending sentence has been given very little scope on the Continent, since it is limited usually to sentences no longer than six months. It can, therefore, be applied only to the milder offenses.

Suspension of sentence is granted usually only to first offenders, even when this is not expressly required by the law. The underlying theory is that those who are not criminals by birth or habit, but who have committed crime through force of circumstances, shall be given a chance to retrieve themselves, to begin life over again.

The success of suspending sentences must depend largely upon the wisdom of the judge. Inasmuch as the existing procedure is intended primarily to ascertain the kind of criminal act which has been committed, and not to reveal the character of the criminal, it is only incidentally and by chance, as it were, that the judge learns anything about criminal character. It is, therefore, on the basis of a comparatively small amount of knowledge that he makes his decision. The result is that he is likely to acquire the habit of granting suspension of sentence in accordance with the circumstances of the crime, and not according to the character of the criminal. Under one set of circumstances he will almost always grant the suspension, while under another set of circumstances he will almost invariably refuse it. At other times he will not be absolutely certain of guilt, and will therefore grant the suspension as a sort of compromize.

The judge is more likely to make a wise decision when he is aided by a probation officer. After conviction he can remand the prisoner without imposing a sentence immediately, and can direct the officer to make an investigation. The officer ascertains all the available facts with regard to the character and past history of the criminal, and as much as possible about the circumstances under which his crime was committed. He reports this information to the judge, frequently with a recommendation as to the best method of disposing of the case. With the aid of this information the judge can usually make a much wiser decision. Furthermore, through the probation officer the judge is able to keep in touch with the criminal after his conditional

release, and to impose the sentence if the criminal proves by his conduct that the confidence of the judge has been misplaced.

In this country the probation system has been developed largely by private philanthropic agencies. Much of this probation work has been done by volunteer workers who have been well-meaning, but many of whom, on account of lack of special training and experience and a sentimental point of view, have not been very efficient. Some of the probation work has been done by policemen, who, on account of their lack of education and prejudiced attitude towards criminals, are peculiarly unfitted for such work. This work should be done by men and women who have had special criminological and penological training, and who are employed by the state. It would then be done as efficiently as is possible under the existing system. As I have pointed out in Chapter XIX, under public defense most of the functions of the probation officer will be taken over by the public defender and performed much more effectively by him.

The probation system, therefore, has its utility as a substitute for something worse, and as preparing the way for something better. It is especially adapted for occasional criminals. It can frequently be used for young offenders. Suspension of sentence frequently is a good substitute for short periods of imprisonment. These penalties have little utility for young and occasional criminals, and are likely to harm them greatly by placing them under corrupting influences. So that it is usually better to release these offenders conditionally, especially if they can go out under the care of a probation officer.

The utility of suspended sentences depends somewhat upon local conditions. It is not always beneficial for the criminal to be returned to the environment in which he has committed his crime. Furthermore, his release may have a bad effect upon others, who may commit crimes because they have seen him return unpunished. In some cases the plaintiff is incensed because the person who has injured him has not been punished, and may take the law into his own hands in order to secure his revenge. It has been suggested that the consent of the injured party should be obtained before a suspension of sentence can be granted. But this is too important a power to give to private individuals, and would furnish the opportunity for the manifestation of feelings of vengeance.

There is, however, another feature of penal treatment which should be connected with the suspension of sentence, and which would counteract partially if not entirely these tendencies towards vengeance on the part of the plaintiff. The offender should be required to pay damages to the injured party as a condition of his release. If the damages are too large, he should pay in proportion to his ability. At present the plaintiff is forced to commence a civil suit for damages, which is usually a costly and uncertain proceeding. It is only just to the injured party that the offender should make restitution as far as he is able. Furthermore, this requirement acts as a salutary check upon the offender who is conditionally released, and impresses strongly upon his mind the injurious effect of his crime upon his victim. In this country the judges occasionally make restitution a condition of release, instructing the probation officer to make sure that the restitution is made, while they threaten the offender with the execution of the sentence if he fails to make restitution. In a later chapter will be discussed the principle of restitution as a fundamental principle of penal treatment.

The Penal Treatment of the Young

In no respect has the individualization of punishment been carried so far as in the penal treatment of young offenders. In all probability they have always been treated somewhat differently from adults. Their immaturity and ignorance have made it impossible to hold them as strictly accountable for their acts as adults. Furthermore, their dependence upon their parents and subjection to parental control have given them a peculiar legal status. Recently the idea has been gaining currency that, because his character and habits are not fixed, it is possible to reform the young criminal, and that, therefore, penal treatment should be adapted to this purpose rather than to punishment.

The principal change in the legal status of the young offender has been with respect to his penal responsibility. Most of the systems of penal legislation now assume that all criminals under a specified age, usually sixteen, have committed their offenses without discernment, or at least admit proof of lack of discernment on account of youth. The penalties are then adjusted

according to whether or not discernment has been proved, in either case the punishment being less severe than for adults. In some legislations an age still lower is designated below which no child can be presumed to be responsible. Any treatment given to these children is with no punitive object whatever. In the common law this age was seven.

On account of the great importance of individualization in the treatment of young offenders, little weight should be given to penal responsibility, and the penal treatment should be prescribed as far as possible in accordance with the needs of each offender. This is all the more feasible in juvenile cases because of the difference in the public attitude towards the child and towards the adult criminal, and because of the greater utility of educational and reformatory agencies than intimidatory punishment in the penal treatment of children. This difference in the attitude of the public and the realization of the utility of these agencies have caused the changes which have already taken place in the procedure and penal treatment for children.

The principal changes in the procedure for young offenders are exemplified in the juvenile courts. These courts have grown out of the probation system, which was usually intended at first solely for young offenders. Inasmuch as this system gave rise to some changes in the procedure, the juvenile cases were usually tried apart from adult cases. This in turn resulted in special legislation with regard to the procedure to be followed in juvenile cases. At present the juvenile courts exist in varying stages of development. In some places they have not yet passed beyond the initial stage of trying juvenile cases at a different hour from the adult cases, though in the same room and by the same judge. In other places the juvenile cases are heard in a different room or building, usually by judges specially designated for this purpose. The procedure also varies considerably.

The juvenile cases are heard apart from the adult cases in order to save the children from being corrupted by older criminals, and also in order to emphasize the peculiar problems involved in juvenile cases. The publicity of the proceedings is usually diminished by holding the trials in a small courtroom, or in the judge's chambers. The purpose is in some cases not to alarm the child, in other cases not to stimulate his vanity by

making him feel that he is in the public eye. Legal formalities are dispensed with as much as possible. A jury is not used ordinarily, though the law frequently requires a jury trial if it is demanded by the defense. Lawyers are used but little. Frequently a public prosecutor is not present, and the form of a trial is dispensed with. In other words, a trial, strictly speaking, is not held. This is feasible because the crimes of children usually are petty, and are committed with more or less publicity. A child will usually admit an offense with a little questioning. A trial can therefore be dispensed with, and the judge conducts an examination to ascertain the cause of the offense and the character and circumstances of the child. The judge is assisted in this work by the probation officer.

The methods of treatment which may be used by the juvenile courts are varied. Whenever advisable, the child is left in the family under the supervision of the probation officer. But this is not always possible, sometimes because the child is incorrigible and cannot be controlled by its parents, sometimes because the family life is bad for the child on account of the viciousness of its parents, or for some other reason. In that case, the child is sent to the institution which is best adapted to give to it the education and discipline it needs. The length of detention is usually indefinite, the maximum limit being the age of majority of the child, which in most jurisdictions is twenty-one years.

These facts indicate how far the juvenile court movement has individualized the treatment of young offenders. In some of these cases the crime is almost entirely ignored. The judicial treatment of young offenders has in some places become an agency of the educational system. This is an excellent solution in some cases. But there is danger of forgetting the true significance of criminal acts. The criminal act frequently is the signal of congenital abnormality in the criminal. When such abnormality is the cause of crime in the child, society needs to be protected against it as much as when it manifests itself in an adult. Expert criminological knowledge should be used to diagnose the criminal tendencies of the child, in order that appropriate measures may be taken against these tendencies. Society must be guarded against anti-social tendencies which are as dangerous in the young as they are in adults, though not

always so immediate in their dangerousness. And at times individualization has to be sacrificed in the interests of social defense against crime.

The question may be raised as to whether the procedure in juvenile cases should be separated entirely from the procedure in other criminal cases. The chief significance of the juvenile court movement is that in breaking away from the old procedure it is preparing the way for a new procedure for adults as well as for children. The juvenile court movement should lead the way to a procedure based upon a scientific knowledge of the criminal and of the causes of crime, such as can be gained only through the science of criminology. When that time comes it may be discovered that the procedure for children and for adults need not differ greatly.

The efficiency of a juvenile court depends largely upon the judge. In his hands is put a great deal of power, which he is free to use more or less arbitrarily. Consequently, he should be well acquainted with young offenders and their offenses, in order to be able to judge juvenile cases wisely. That is why it is frequently contended that the juvenile court judge should serve continuously in the juvenile court. When he comes to the juvenile cases from the trial of other cases, he is likely to bring with him a legal point of view which is out of place in a juvenile court. Furthermore, the authority of the judge over the children does not end with the decision of their cases, but it continues as long as they are on probation, or in the institutions from which they can be discharged only with his permission. It is, therefore, important that he should be acquainted from its beginning with the history of each individual case coming under his authority.

At the same time, it is doubtful if it would be advisable to develop an entirely specialized group of juvenile court judges. It is essential that a judge on the criminal bench should be acquainted with the traits both of the young and the older criminals, in order to be able to judge properly the cases either of the young offenders or of the adult criminals. So that a certain amount of interchange between the juvenile courts and the other criminal courts will probably always be desirable.[1]

[1] Detailed descriptions of the probation system and the juvenile courts are given in several books, among them being the following: — B. Flexner

Judicial and Administrative Individualization

By means of rehabilitation the criminal record of an individual may be effaced. In France there are two kinds of rehabilitation, legal and judicial. In the case of certain crimes, when a specified time has elapsed after the expiration of the sentence, the record of the conviction is automatically effaced by the law without any action being necessary on the part of the criminal, provided there has been no recidivism. The time which must elapse depends upon the length of the sentence, and is usually several times as long as the sentence. In the case of other crimes, after being released from prison on conditional liberation, the convicted person may under certain circumstances secure judicial rehabilitation from a court. Inasmuch as a criminal record usually injures materially the future prospects of an ex-convict, it is of some assistance to secure the effacement of the official written record, to say the least, though this does not efface it from the memories of men.

In this chapter I have been describing judicial individualization in particular. This must be combined with administrative individualization, in order to make a complete system of individualization. Such a system requires, on the one hand, a classification of the different types of criminals, and, on the other hand, a classification of penalties or methods of penal treatment. The types of criminals have been described in earlier chapters. Capital punishment, imprisonment, and the other penalties will be described in the following chapters.

Judicial and administrative individualization should be connected and coördinated with each other by means of the revision of sentences. From time to time after a penalty has been imposed the sentence should be revized by the court with the aid and coöperation of the officials who administer the penalty. As the penal system becomes more and more scientific in its organization, it will become more and more feasible to discern accurately the character of the criminal, and to adjust the penalty accordingly. So that within the necessary limita-

and R. N. Baldwin, *Juvenile Courts and Probation*, New York, 1914; Cecil Leeson, *The Probation System*, London, 1914; Douglas Pepler, *Justice and the Child*, London, 1915.

tions upon individualization it will become possible for the court of revision to individualize wisely.[1]

[1] It has been suggested that the court of revision should be called the "court of rehabilitation." (See R. B. Molineux, *The Court of Rehabilitation*, in *Charities and the Commons*, September 28, 1907.)

At present the term "rehabilitation" is applied customarily to the official effacement of the record of a crime. This function will doubtless be performed by the revizing court. But inasmuch as most of its work will consist of revizing sentences and penalties, it is preferable to designate it as a "court of revision" rather than as a "court of rehabilitation."

CHAPTER XXV

THE DEATH PENALTY

Arguments for and against capital punishment — The abolition of the death penalty — Humanitarian sentiment and the death penalty — The death penalty and political crime — Methods of capital punishment.

THE most drastic penalty is death. Capital punishment has been much used in the past. For example, as recently as 1797 in England "the number of capital offences without benefit of clergy was 160, and it rose to 222, when the efforts of Sir S. Romilly for reform in this matter succeeded only so far as to have pocket-picking, which was capital above one shilling, taken out of the list of capital offences." [1] During the nineteenth century most of the capital offenses were abolished in all civilized countries, while the death penalty has been entirely abolished in a few countries.[2]

In modern times the wisdom and justice of the death penalty has been hotly debated, and an extensive controversial literature upon this subject has arisen. In fact, more attention has been given to this subject than it really deserves. A large part of this literature is of a mawkishly sentimental nature, especially the writings against the death penalty, and can therefore be disregarded. Some of this literature presents weighty arguments for and against capital punishment, and is therefore worthy of serious consideration.

[1] E. F. Du Cane, *The Punishment and Prevention of Crime*, London, 1885, p. 18. See also L. O. Pike, *A History of Crime in England*, Vol. II, London, 1876, pp. 447–453.

[2] Capital punishment has been abolished in Brazil, Costa Rica, Holland, Italy, Norway, Portugal, Russia, Venezuela, in three Mexican States (Campeche, Pueblo, Yucatan), and in fifteen out of the twenty-two Swiss Cantons.

The death penalty has been abolished in the United States in eleven States, namely, Arizona, Kansas, Maine, Michigan, Minnesota, North Dakota, Oregon, Rhode Island, South Dakota, Washington, Wisconsin. It has been abolished and restored in Colorado and Iowa.

Arguments for and Against Capital Punishment

The two principal arguments in favor of capital punishment are the following: The first is that death is the most effective manner of removing permanently dangerous members of society. The second is that capital punishment has a greater deterrent influence upon criminals and potential criminals than any other penalty, because it is presumably the most fearful. Attempts have been made to prove by statistical methods the great deterrent influence of punitive death. But it is obviously difficult to measure a phenomenon so subtle as the intimidatory effect of any form of punishment, and this is especially true of capital punishment. In every case complicating factors are present which vitiate in a measure any conclusion which is drawn from the available figures.[1]

It goes without saying that the same difficulties beset any attempt to disprove the deterrent influence of capital punishment.[2] All the more true is this of the attempts made by some opponents of capital punishment to prove that not only does capital punishment fail to deter from crime, but that it actually incites to crime. While this has unquestionably been proved in a few specific cases, it is impossible to prove it by statistical means for the effect of capital punishment in general. In all probability the death penalty has a powerful deterrent influence, perhaps more so than any other penalty. But on account of these difficulties in the way of the statistical method, I shall view capital punishment mainly from a standpoint somewhat broader than its immediate deterrent effect.

The two principal arguments against capital punishment are the following: The first is that death is an irrevocable penalty.

[1] One of the best attempts to correlate increase of criminality with a diminishing use of capital punishment has been made by A. Lacassagne, *Peine de mort et criminalité*, Paris, 1908. But even this study cannot be regarded as conclusive.

[2] Many opponents of capital punishment have tried to disprove by statistical methods the deterrent influence of this penalty. See, for example, K. d'Olivecrona, *De la peine de mort*, Paris, 1868; J. Oldfield, *The Penalty of Death or the Problem of Capital Punishment*, London, 1901; F. Emory Lyon, *Is Capital Punishment Justified?*, in *The South Mobilizing for Social Service*, published by the *Southern Sociological Congress*, Nashville, 1913, pp. 193–203. Most of these attempts have been grossly illogical, and have been inspired by sentiment but not controlled by science.

In cases of judicial error it is impossible to do anything in the way of amendment and indemnification after the penalty has been inflicted. The second is that this penalty violates humanitarian sentiment and regard for human life by deliberately destroying human life.

What then are we to say with respect to these arguments for and against capital punishment? It is unnecessary to deny that punitive death has had social utility in the past. In the earlier days police protection was weak, and it was difficult to inflict long continued penalties such as imprisonment. It was, therefore, inevitable that when criminals were apprehended, severe and summary penalties were inflicted upon them, both for the purpose of making them horrible examples, and in order to check them effectually in their criminal careers. These penalties became all the more harsh when the anathema of religion and the vindictiveness of a despot or ruling class made the penal law more rigorous.

How much deterrent influence these penalties exercized it is impossible for us to ascertain now. But it is probable that they served to a certain extent as a selective force to eliminate anti-social individuals. That they also served as a brutalizing factor is also probable, but this was not a matter of so much consequence under the ruder conditions and folkways which prevailed at that time.

But social conditions have greatly changed in all of these respects during the past century or two. Police protection has become much more efficient, and criminals are now pursued more relentlessly and more effectively probably than at any time in the past. It is now possible to choose from a greater variety of penalties, and to apply penalties more suitable to the specific crime and the individual criminal. These changes are already reflected in the disappearance of many of the severe and summary penalties, and in the general amelioration of penal treatment.

The Abolition of the Death Penalty

The question can, therefore, be pertinently raised on eminently practical grounds as to whether or not the death penalty, already greatly restricted by the law in its scope, cannot be entirely dispensed with. In the first place, it is now within the

bounds of possible attainment to segregate permanently the offenders who have shown that they will always menace the safety and welfare of society. The great difficulty at present in the way of such permanent segregation is the misuse by executives of the pardoning power. It is frequently difficult for an executive to withstand the sentimental or political pressure which is brought to bear upon him to exercize clemency where there is no justification for such clemency. As soon as the pardoning power is abolished and the function of revizing sentences is placed in the hands of scientific boards in the manner described in the preceding chapter, this difficulty will disappear. It will then be possible to use scientific knowledge to determine which criminals should be permanently segregated, instead of leaving the decision of these important questions to arbitrary legal standards and to the fortuitous exercize of the pardoning power by executives.

Furthermore, in all probability permanent segregation will in the long run have as great if not a greater deterrent influence than the death penalty, because few criminals can face the prospect of perpetual incarceration with greater equanimity than they do face the prospect of death. This will be all the more true because permanent segregation under the conditions described will be more certain than capital punishment today.

At present the death penalty is very uncertain as a deterrent force, because it is frequently difficult to induce juries, judges, and executives to inflict it. This is due sometimes to an aversion against the deliberate destruction of human life, and sometimes to a realization of the fallibility of human justice, which may make an error which is irredeemable if the death penalty is inflicted. Statistics have been compiled which indicate that acquittals are much more frequent in homicide cases where the death penalty prevails than they are where capital punishment has been abolished.[1] This fact suggests that the death penalty tends to restrain courts from convicting in many cases where there is ample evidence for conviction. Still another factor which diminishes the certainty of the death penalty is the plea of insanity which is constantly being invoked with more or less success under our present system of procedure to avert this pen-

[1] *Cf.* Maynard Shipley, *Does Capital Punishment Prevent Punishments?*, in the *American Law Review*, Vol. 43, May–June, 1909, pp. 321–334.

alty. These weaknesses in our system of penal repression are to a large extent responsible for the excessive number of homicides in this country.[1] They are responsible also for many of the lynchings.

Another factor which will make life imprisonment more effective as a deterrent influence will be a more efficient administration of penal institutions and of the police, thus making escapes much more difficult. This will be all the more true because as time goes by the number of criminals in prison will doubtless decrease greatly. This will be due in part to a decrease in the extent of crime, but mainly to the substitution of other forms of penal treatment in the place of incarceration within the walls of prisons. So that enforced residence in reform schools, reformatories, and farm and industrial colonies, restitution, custodial surveillance, etc., will take the place to a large extent of imprisonment in the usual sense of that term. This will simplify greatly the problem of preventing escapes, because there will then remain in prison only the hopeless criminals who are comparatively few in number, and who have been condemned to perpetual confinement. At present the problem of preventing escapes is greatly complicated by the presence in prisons of a vast number of criminals of many diverse types requiring different kinds of treatment. The importance of giving many of them a certain measure of freedom in the prison life makes it all the more difficult to keep the few incorrigible ones in strict confinement.

The death penalty is the most arbitrary of all punishments, and is therefore a serious obstacle in the way of individualization. This is clearly illustrated in the case of the crime to which capital punishment is now almost exclusively restricted, namely, murder. Many murders are committed in fits of passion by persons who are otherwise non-criminal. Some of them are committed by paranoiacs and other lunatics who are laboring under insane delusions. Some of these insane murderers are possessed by homicidal manias which are frequently due to sadistic tendencies. Some murders are committed by robbers, burglars, and other professional criminals whose primary object is not homicidal, but who commit murder in order to accomplish their primary criminal purpose, which is usually to steal.

[1] See Chapter XXI.

It is obviously stupid to inflict the same penalty on all of these different types of murderers. It is true that there has always been a certain amount of individualization in practise, because juries, judges, and executives have frequently discerned the differences between these different types, and have varied the penal treatment accordingly. For example, murderers by passion have frequently escaped from the courts without any punishment or with mild penalties. But, on the other hand, many insane or feebleminded murderers have been sent to the scaffold because their mental infirmity has not been discovered, while the plea of insanity has sometimes been successfully used as a cloak for the protection of the professional criminal who had committed murder. The abolition of the arbitrary death penalty would make more feasible the individualization of the penal treatment of murderers.

The abolition of capital punishment would prevent the irrevocability of punishment in every case of judicial error. Furthermore, it is obviously feasible to devize other penalties which would be as effective in preventing incorrigible criminals from preying upon society, and which would probably be as deterrent in their effect upon other criminals and potential criminals. Perpetual confinement is, of course, the principal one of these penalties. But this could be inflicted in different ways. If the criminal is sane and not feebleminded, incarceration in a prison for life would usually be the most appropriate penalty. But if the criminal is feebleminded or hopelessly insane, he should be confined for life in an asylum for the feebleminded criminals or for the criminal insane.

It has been suggested that castration might be used as a supplementary penalty in these cases. This operation has such an effect upon the character as to tend to check the individual from committing acts of violence, though it seems to do injury to the character in other ways by stimulating lying, deceitfulness, cowardice, etc. Consequently, castration might make these criminals more amenable to prison discipline, while if by any chance they returned to society it would restrain them from homicide and similar acts of violence, and would prevent them from procreating.[1]

[1] *Cf.* Servier, *La peine de mort remplacée par la castration*, in the *Arch. d'anth. crim.*, Vol. XVI, March, 1901, pp. 129–141.

There still remains the objection to the abolition of the death penalty that it would entail a considerable expense upon society to maintain in existence the incorrigible criminals for the duration of their natural lives. This expense can be partly if not entirely removed by forcing these criminals to engage in productive labor within the prisons. But even if this expense must be incurred, there are other gains from the abolition of the death penalty which will more than compensate society for this expense.

Humanitarian Sentiment and the Death Penalty

I have already indicated that mawkish sentimentality with respect to the death penalty should be repudiated. If it were indeed necessary to social welfare to put to death the worst of the criminals, there should be no opposition to it on sentimental grounds. There would be no excuse whatsoever for wasting any sympathy upon the criminals themselves.[1] But there is ample

"En résumé, voici ce que nous avons proposé et cherché à démontrer: il est à désirer que la peine de mort, procédé barbare, soit abolie; elle serait remplacée, sans désavantage, par la peine de l'eunuquage, laquelle, bien que ne supprimant pas le criminel, le met dans un état d'infériorité telle qu'il ne demeure plus un être nuisible et dangereux, et, surtout, prévient la venue au monde de créatures tarées par un vice originel, opérant ainsi une sélection éminennent favorable à l'amélioration de la race." (P. 140.)

[1] At the time of the present writing (August, 1917) a notorious homicide in New York City (the De Saulles case) illustrates the vicious, mawkish sympathy frequently displayed by a considerable portion of the public in behalf of murderers. A woman shot her former husband to death, apparently with deliberation and in cold blood. Immediately she began issuing statements which blackened the character of her victim, who could no longer defend himself because she had killed him. The sensational newspapers aided her by publishing her defamatory statements and many facts and alleged facts about her which were calculated to arouse sympathy in her behalf.

Unfortunately, in accordance with our law it is possible for the defense to introduce into the court proceedings these slanderous statements in connection with a plea of insanity, while the reputation of the victim of the murderer cannot be defended. As a New York newspaper has said with reference to this case, "this opens the door to the loosest scandal and even to slander, and by the rulings of our courts the dead man's friends cannot have the privilege of a defendant in any other case, cannot introduce evidence in his behalf. However it may go with his slayer, the dead man is always convicted, sentenced and punished, though it is upon those who loved him that the real punishment falls." (*New York Times*, August 10, 1917.)

reason to believe that capital punishment should be abolished in deference to humanitarian sentiment which cannot be ignored.

The most salient feature of the modern humanitarian movement is the manner in which it has enhanced the value of human life. This has been manifested in numerous attempts to cure the sick, to prevent infant mortality, to reduce the mortality from warfare, to prevent wars, etc.[1] It is inevitable, therefore, that the deliberate taking away of human life by a social agency must shock this humanitarian sentiment regarding the supreme value of human life. Furthermore, deliberate homicide, however legal in form and moral in intent it may be, must inevitably have at least a slight brutalizing effect upon society at large. So that, quite apart from its effect upon crime, there is ample justification for abolishing capital punishment because of its effect upon society in general, most of whose members are in no danger whatever of committing the crimes punished by the death penalty. In fact, it is probable that, even if it were desirable to retain the death penalty for the prevention and suppression of crime, it would still be justifiable to abolish capital punishment on account of the above considerations.

In this connection we may compare punitive death with war. There is no occasion to defend warfare, which is one of the greatest of social evils, far greater than the death penalty could ever be. Furthermore, it is needless to add that the mortality from warfare is vastly greater than the mortality from capital punishment, and that the death penalty is inflicted upon persons who can be dispensed with by society far more readily than most of those who are lost in war. It is nevertheless true that much of the killing of human beings in wartime is committed under the influence of passion which frequently reaches a state of moral exaltation. The death penalty, on the contrary, is invariably the most deliberate and cold-blooded form of legalized homicide. So that the brutalizing effect of capital punishment probably is greater in proportion to the number of lives destroyed than is the brutalizing effect of warfare.

Nor is it possible to escape the conviction that the death

[1] See my *Poverty and Social Progress*, New York, 1916, Chap. XVII, entitled "The Modern Humanitarian Movement."

See also my article entitled *The Rise of Modern Humanitarianism*, in the *Am. Jour. of Sociology*, Vol. XXI, No. 3, November, 1915, pp. 345–359.

penalty is the most vindictive form of punishment, and is all the more repellent as such because it is deliberate and cold-blooded. This is clearly illustrated in the case of murder, which is the crime to which it now is almost exclusively restricted. It is obvious that this is a survival of the *lex talionis*, the taking of a life for a life. Like most of the poetic penalties, it is probably not the most efficacious method of checking and preventing the crime to which it is applied.

It may be said that in many cases the death penalty is not so severe as life imprisonment would be. But this is not at present recognized in inflicting the penalty. If it were, the culprit would be given the choice between death and life imprisonment. So far as I know, this choice is nowhere accorded to the condemned person by the law, though the death sentence is frequently commuted to life imprisonment by the executive power.

The Death Penalty and Political Crime

So far I have been discussing capital punishment for common crimes alone. In the past death has been the usual penalty for treason, and it still is so at law for some kinds of treason in most if not all countries, though rarely inflicted in many countries. In a few countries, such as Russia, it is inflicted for political offenses but not for common crimes.[1] It is hardly necessary to state that there can be no excuse for the supreme penalty for political offenses in time of peace. In such cases it can serve only as a bulwark for tyranny, and as an obstacle to political progress. No form of government which needs to bolster itself up with the aid of the death penalty is worthy of survival. A government which rests upon the will of the people and which is responsive to the wishes of its citizens can well dispense with this penalty.[2]

[1] The above statement was written previous to the Revolution of 1917, which abolished the death penalty for political offenses in Russia.

[2] Viaud has given an exhaustive and convincing exposition of the arguments against the death penalty for political offenses. (J. Viaud, *La peine de mort en matière politique*, Paris, 1902.) He points out how unjust and stupid it is for any democratic government to make use of this penalty. "Pour rétablir chez nous la peine de mort en matière politique, un gouvernement ne devrait pas seulement faire parade du mépris le plus absolu de

In time of war the situation changes somewhat. Taking war as it is, and must always be, it is inevitable that death should be inflicted upon spies and others guilty of treason. It is hardly possible to modify martial and military law in this respect. The only way of dispensing with the death penalty in these cases is to prevent war itself.

Methods of Capital Punishment

These humanitarian and political considerations, as well as those already adduced, indicate that capital punishment should be abolished. But so long as it continues to exist, it should be shorn as far as possible of its obnoxious and injurious features. This is attempted in all civilized countries.

In the past it was customary to inflict the death penalty in public, probably usually for exemplary reasons. But it came to be realized gradually that publicity did not increase its deterrent influence. In fact, it only tended to give to it a value in the eyes of vain and mentally ill-balanced persons who craved this publicity. Furthermore, publicity increased greatly its brutalizing effect upon society at large. For these reasons public executions have become rare in civilized countries.

It is also attempted in the civilized world to make the death penalty painless, and to avoid unnecessary mutilation of the body. In order that an execution may be devoid of pain, it is essential that death, or at least loss of consciousness, should come at once. In some methods of execution it is difficult to determine just when consciousness ceases. Hanging is used in many states in this country, in England, and elsewhere. When properly carried out it breaks the neck at once, so that in all probability no pain is experienced. Electrocuting is used in a few states in this country. It is a clean way of causing death, and does not mutilate the body. But there is still a little uncertainty as to whether or not there are a few seconds of excruciating pain before consciousness is lost.[1] Shooting is used in a

toute équité, il faudrait le supposer aveugle jusqu'à la folie du suicide moral." (P. 360.)

[1] Spitzka expresses the opinion that electrocution is always painless, but that hanging frequently causes pain. (E. A. Spitzka, *Observations Regarding the Infliction of the Death Penalty by Electricity*, in the *Proc. of the Am. Philosophical Soc.*, Vol. XLVII, No. 188, Jan.-Apr., 1908, pp. 39–50.)

few countries, as in Austria, and is an effective method with little mutilation when properly carried out. Beheading by means of the guillotine is used in France. This is a sure method of bringing about instantaneous death, but it seriously mutilates the body.

I do not know to what extent poisoning is now used, but it has been a popular method in the past. It is a clean and effective method, and is painless if properly applied. It is possible that a choice of several methods should be offered to the condemned person. This is the case in Nevada, where the choice is between shooting and hanging.[1]

In the last place, I should like to emphasize again the importance of reforming criminal procedure so that the plea of insanity will be properly used and feeblemindedness will be recognized. By so doing the murderers who are incapable of understanding the nature of their acts will be saved from the death penalty. In this manner the injustice of executing morally irresponsible persons will be prevented.

[1] *Criminal Practice*, Section 431. "The punishment of death shall be inflicted by hanging the defendant by the neck until he is dead, or by shooting him, at his election. If the defendant refuse or neglect to make the election, the court at the time of rendering the sentence must declare the mode of execution and enter the same as a part of its judgment." (*Revised Laws of Nevada*, Carson City, 1912.)

CHAPTER XXVI

THE PRISON SYSTEM

The types of prisons — The cellular prison — Development of the personality of the prisoner — Prison administrators — Solitary and social prison life — Classification of prisoners — Prison labor: prison maintenance; wage labor for prisoners — Evils of contract labor — Educational, religious, and recreational facilities — Prison discipline: causes of misconduct in prison; malingering; prison penalties; the marking system — Self government in prisons — Sex problems in prisons — The prison psychosis — The prison type.

THE characteristic feature of the prison system in the nineteenth century has been the cell. A few cellular prisons were built previous to the nineteenth century. But cellular confinement was most widely used during the nineteenth century. It was in a measure due to a reaction against the type of imprisonment prevalent during the eighteenth century. At that time prisoners were mingled together with little or no attempt at segregation or classification. The physical and moral evils arising from this indiscriminate and heterogeneous method of imprisonment were disclosed by prison reformers. It was endeavored to prevent these evils by segregating the prisoners as completely as possible in individual cells. It was thought that by separating the criminal from evil companions and by placing him in solitude he would be encouraged to repent from his misdeeds and to acquire a contrite heart. This type of imprisonment came to be known in this country as the Pennsylvania system, because it was introduced at an early date into the Eastern State Penitentiary of Pennsylvania located at Philadelphia.

At the same time the idea that prisoners should be made to work was becoming prevalent. It was discovered that it was bad for the prisoners themselves to remain idle, while it was bad for society that they should be unproductive during the period of incarceration. Consequently, it was attempted to introduce systems of prison labor. But this soon caused difficulties with respect to the solitary method of confinement. While there were

a few kinds of labor which could be carried on in the cells, most of the forms of industry suitable for the prison had to be carried on in large workshops. Consequently, there arose a compromize between the solitary and the social system of imprisonment. The prisoners were marched into the workshops to work during the day under strict supervision, but were kept in solitude the rest of the time. This system has come to be known in this country as the Auburn system from the New York State Prison at Auburn. It is the prevailing prison system in this country at the present time.

There are several kinds of penal institutions which are prisons or which partake of the nature of prisons. Places of temporary detention, such as police stations, are prisons in the sense that persons are forcibly detained in them. But they are used principally for the detention of persons who are not necessarily criminals, such as defendants in criminal trials, witnesses, etc. So that they are not prisons in the full meaning of the term.

Jails, such as city and county jails, are local prisons, to which criminals are usually committed only for short sentences. A workhouse is a type of jail in which work is required of the inmates. Agricultural penal colonies are farms upon which criminals are forced to work, and where they are kept under a certain measure of restraint. But there is more freedom in one of these penal farm colonies than there is in an ordinary prison.

Industrial reform schools are partially penal institutions to which criminal and wayward children are committed. Here they are kept under some restraint. But it is usually attempted to make these institutions more like trade schools than prisons. The industrial reformatories are prisons for young criminals who furnish some hope of reform. But they are educational and industrial institutions as well as prisons.

Penal institutions have been established for pathological types of criminals. Among these are a few criminal inebriate asylums, and a number of criminal insane asylums.

The state and national penitentiaries are prisons to which criminals are ordinarily committed for long terms.

I shall now describe the problems of prison construction and administration which are involved to a greater or less degree in the establishment and management of every kind of penal

institution. I shall then describe more specifically the differences between the various types of prisons.

The Cellular Prison

There are two principal types of cell building. One type has corridors just inside the outer walls of the building. In the other type a corridor runs through the center of the building.

The first type is the most common in this country. Rows of cells are set back to back in the center of the building. The cells receive light and air from the corridors and not directly from the outside. The following arguments are used in favor of this type of cell building. They are said to be cheaper to build, partly because the plumbing arrangements are simpler. They are safer because the prisoners can be watched by the guards from the front of the cells, and also from the rear through peep-holes which look into the cells from a narrow passage way which runs between the two rows of cells. The cells are more private in so far as the prisoners cannot look into each other's cells. But, on the other hand, the cell doors must necessarily be made of bars in order to admit light and air from the corridors. Consequently, there is no privacy from persons passing through the corridors.

In the other type of cell building the cells are just inside the outer walls of the building. They are lighter and airier than in the first type of cell building. Furthermore, through the cell windows the inmates can secure glimpses of the outer world. The cells can be made private by means of solid doors with peep-holes through which the guards can watch the inmates. If the cell windows are protected with strong bars and are frequently inspected, there is little danger of escape.

The cell building with the inside corridor seems on the whole to be most desirable for the welfare of the inmates. The cells should be constructed of concrete or other material which can be kept clean and free from disease germs. Each cell should be large enough to provide plenty of cubic feet of air for at least one inmate. Each cell should contain a comfortable bed, a chair, a good light, a toilet, and running water. As far as possible there should be only one inmate in each cell.

The cottage system in the place of the cell blocks is now being

advocated by some prison reformers. This system is more homelike and therefore pleasanter in some ways for the prisoners. But the cell blocks are usually more economical, especially where a large number of inmates must be housed. The cell system is not seriously objectionable if the inmates are not forced to spend much of their time in their cells. If the cells are sanitary and comfortable, they serve very well as small bedrooms. They may also be used in the evening for a short period of quiet reading and meditation before bedtime. The modern prison cell is no worse than a monastic cell, or the hall bedroom in which many a poor person has to live.

It is, however, highly desirable that the huge cell blocks containing a thousand or more cells should no longer be built. Instead there should be constructed small cell blocks containing from fifty to one hundred and fifty or two hundred cells. These small cell blocks facilitate the classification of the prisoners into homogeneous groups. By permitting association in the corridors each building can become in a measure a social unit. The buildings can be graded according to their desirability as places of residence, and the privilege of living in the more desirable buildings can be used as a valuable incentive to good behavior. Furthermore, the small cell buildings render it more feasible to make changes in the administration of prisons. Inasmuch as prison administration will doubtless modify greatly during the next few decades, this is an important consideration. In course of time the small cell blocks may develop into the cottage system.[1]

Solitary and Social Prison Life

The ideal of prison administration should be to provide, as far as prison conditions will permit, a normal social life for the prisoners. Inasmuch as most of the prisoners will return eventually to life in society, an unsocial or anti-social life in prison is not likely to fit them for life in society.

In a prison the personality of the prisoner should be developed with a view to making him a useful member of society.

[1] The prison cell and cellular confinement have been discussed in numerous penological works. See, for example C. R. Henderson, *The Cell: A problem of prison science*, in the *Jour. Crim. Law*, Vol. II, No. 1, May, 1911, pp. 56–67; *71st An. Rep. Prison Ass'n of N. Y.* [*1915*], Albany, 1916.

The suppression of individuality by unnecessary uniformity should not be tolerated. While discipline is an essential feature of prison life, an artificial uniformity is not usually the best form of discipline. Shackles, the lockstep, a distinctive prison uniform such as stripes, the compulsory cropping of the hair and shave, etc., should be abolished. Some of these disciplinary measures, such as the lockstep, hamper the ex-convict in his after-life in society at large. In the place of these harmful forms of discipline should be substituted gymnasium and military drill, enforced cleanliness and neatness, regular habits of eating and sleeping, temperance, and habits of industry.

In order that the prison shall be administered efficiently the superintendents, instructors, and guards should be trained for their important duties, and should be adequately remunerated. The fee system should be abolished. Under this system those who profit from the fees are mainly interested in keeping as many as possible in prison, and are not interested in preparing the inmates to leave prison.

As I have already stated, there have been great differences in prisons as to the degree of association permitted among the inmates. In many of the European prisons and in some of the American prisons the attempt has been made to isolate the prisoners entirely from each other. In these prisons practically all of the time of the prisoner is spent in his own cell, and he is not permitted even to see his fellow-prisoners. The only social life allowed him is a very small amount of social intercourse with the prison officials and visitors.

It has been alleged in behalf of solitary confinement that the prolonged meditation caused by it induces a state of remorse, contrition, and repentance for the evil committed by the prisoner. Consequently, he resolves to follow a virtuous life after leaving prison. Furthermore, it saves the prisoner from association with criminals who are worse than himself, and who will consequently contaminate and corrupt him beyond the point he has already reached. By shielding his features from his fellow-inmates he will be saved from recognition by other criminals after he leaves prison.

It is, however, almost certain that remorse and repentance are not the usual results of solitary confinement. This may happen to a few of the criminals by passion and of the occasional

criminals. But it is doubtful if it can ever happen to the feeble-minded and psychopathic criminals, and rarely to the professional criminals. On the contrary, solitary confinement is much more likely to lead to brooding over fancied wrongs and the hardness of fate. This brooding is almost certain to intensify the hostility and bitterness of the criminal towards society, and thus to make him much more dangerous to society after he leaves prison. If the solitary confinement is prolonged for many years, it is almost certain to give rise to a prison psychosis which is likely to develop into insanity. This fact has been recognized even by many of those who advocate solitary confinement, and has led them to consider it desirable to place a limit to the length of solitary confinement, as, for example, ten or fifteen years.

The inmates can be saved from corruption within the prison to a large extent if they are properly classified. If the inexperienced criminals are not permitted to mingle with the hardened criminals, the danger from this source will be reduced to a minimum. But even granting that at least a small amount of corruption will result from association within the prison, solitary confinement for all the prisoners is too great a price to pay for the prevention of this corruption. The prisoners will gain more in the long run from a classified system of association.

It is obvious that the ideal of the normal social life, as far as prison conditions will permit, mentioned above, cannot possibly be attained unless a large measure of association is permitted within the prison. This ideal is not attained when the prisoners merely eat together in the same dining room, and work together in the workshops, but are not permitted to talk together or have any lawful intercourse, as is the case in many prisons. It goes without saying that speech is an essential feature of normal social life. The inmates should, as a general rule, be permitted to converse during their meals, and perhaps sometimes at their work. Furthermore, they should be given periods of recreation during which they can mingle and converse freely with the members of the class in the prison to which they have been assigned. By this means they can maintain relations of friendship if not of intimacy with some of their fellow-inmates during their incarceration. There are few if any human beings who can fail to become more unsocial, and usually more anti-social,

if they are cut off from such human relationships for any great length of time.

Prison Labor

One of the most serious problems of prison administration is convict labor. In many prisons in the past labor was not provided for the inmates, except possibly when unremunerative and unproductive labor, such as the treadmill, was imposed as a form of discipline. Idleness in prison is even more harmful than it is elsewhere, and frequently becomes a burden to the inmates themselves. So that penal servitude has been introduced into most of the prisons to which criminals are sentenced for long terms, and some of the short term prisons as well. But there are many defects in the system of prison labor which must be corrected.

It is essential, first of all, to state clearly and precisely the purposes of prison labor. In the first place, it should pay in large part if not entirely the cost of maintaining the prisons. In the second place, it should be organized and administered in such a fashion as to furnish the prisoners an industrial training which will aid in making them useful and productive members of society after they leave prison. In the third place, it should contribute as far as possible towards the self-support of the prisoners.

When the prisoners have not been forced to work, the whole expense of maintaining the prisons has fallen upon the public. Most if not all of this expense can be obviated by using the labor supply available in the prisons. In the first place, the inmates can do most of the work of caring for the prison itself. Sometimes they are able even to take part in constructing the prison. The remainder of the labor supply can be used to produce goods which have value outside of the prison. These goods can be profitably disposed of in two ways. They can be put on the market and sold. There has been a good deal of objection to this method because there is a tendency for the government to undersell the same goods produced by private manufacturers, and thus to give rise to unfair competition against the manufacturers and the free labor outside of the prisons. Or these goods can be made to be used by the other branches and departments of the government. This is the so-

called "state use" system which is being more and more widely adopted. By this method the prison system can help to support the government without giving rise to unfair competition in the open market.

The prison industries should be somewhat varied in order to utilize the different kinds of skill possessed by the inmates, and also in order to furnish several forms of industrial training for the inmates who are ignorant of a trade. They should be supervized by persons who are competent to instruct, so that the prison labor system will be educational as well as financially profitable. As far as possible there should be included the different kinds of trades best suited to the types of physical and mental ability represented in the population of the prison. There should be out-of-door work, such as farming and construction work, for the physically strong and robust, and indoor work, such as tailoring, cabinet-making, etc., for those who are better fitted for indoor work. Furthermore, the kinds of work provided in each institution should be determined largely according to the types of criminals for which the prison is specialized. Thus the trades in a reformatory for young offenders would differ somewhat from those in a prison for adults, the industries in a penal institution for the feebleminded would differ somewhat from those in a penal institution for the insane.

A careful record should be kept of the cost of maintenance of each inmate of a prison. Then the inmate should be encouraged to become self-supporting within the prison as far as possible by producing enough to cover the cost of his maintenance. The interest of the prisoner in his work can usually be aroused by offering to pay him all or at least a part of what he produces over and above what it costs to support him. It may even be well to itemize the account of expenditure for his support, and require him to pay with the fruits of his own labor for his food, clothing, lodging, etc., except when disabled from doing so, in which case the state would support him as it cares for other dependents. By this means the interest of the prisoner is aroused in the problem of his own maintenance, and his self respect is encouraged by the feeling that he is not financially dependent upon others and is not being pauperized. In most cases he will endeavor to make more than it costs to maintain him in the prison. He may be permitted to spend a limited

portion of the surplus of his wages over his cost of maintenance while in prison. But if he has a family, it should be devoted to the support of his family. Otherwise most of it should be saved up to be used by him after he leaves prison.

A few attempts to introduce a system of wage labor into the prison system have been made.[1] But in most places prison labor is still regarded merely as a form of penal servitude. The state doubtless has the right to impose labor as a form of punishment, and such labor has a certain amount of punitive value. This labor would, however, have much greater psychological and moral value if it was directed at least in part towards repaying, whenever possible, the victim of the crime for the injury he has sustained. I shall describe punitive reparation in the following chapter, and shall then show that the principle of reparation should be combined with the principle of compensation for the prisoner.

Evils of Contract Labor

But while penal servitude to the state is justifiable, there can be no justification for penal servitude to individuals. It has nevertheless been customary for the state to sell the labor of convicts to private employers. During the Colonial days many convicts were sent here from England, and their labor was sold to the colonists for the period of their sentences. It is still possible in several of the Southern states to sell the labor of the convicts outside of the prisons.[2] This has resulted in the brutal "peonage" system in these states in which the convicts have been almost literally sold body and soul to the purchasers of their labor.

It is obviously dangerous to put helpless convicts who have little or no legal redress into the hands of private employers. In the Southern peonage camps the convicts are fed and housed

[1] Some of these attempts are described by W. N. Gemmill, *Employment and Compensation of Prisoners*, in the *Jour. Crim. Law*, Vol. VI, No. 4, November, 1915, pp. 507–518.

[2] According to Whitin in 1913, prisoners could be leased for work outside of the prisons in Alabama, Arkansas, Florida, Louisiana, North Carolina, South Carolina, and Tennessee. (E. S. Whitin, *The Caged Man*, in the *Proceedings* of the Academy of Political Science in the City of New York, Vol. III, No. 4, July, 1913, pp. 24–25.)

by the employers, and are almost entirely in the power of the employers during the period they are leased to them. This situation is a strong temptation to the selfishness and cupidity of the employers. They are very likely to spend as little as possible in caring for the convict laborers, and to procure as much labor as possible out of them. Furthermore, the desire to secure cheap labor will impel them to use every possible means, sometimes illegal as well as legal, to induce the officers of the law (sheriffs, judges, etc.) to arrest and convict numerous vagrants and other defenseless persons for alleged offenses. In this fashion the contractors recruit their chain gangs for road work, the lumber camps, etc.

But there are serious objections against leasing convict labor within the prisons as well. It is true that under these conditions the prisoners are not at the mercy of the contractors to the same extent as in the peonage camps. But it is impossible under a contract labor system to attain the objects of prison labor which have been described. It is impossible to interest the prisoners in their work when they know that they are being exploited by private contractors, whereas this interest may be aroused when they are working solely for the state and for themselves. It is impossible to train the prisoners as effectively under contract labor as under the state system. It is difficult to devize a satisfactory system of compensation for the prisoners under contract labor. The supervision over the workshops by the contractors is likely to be a disturbing factor in the prison administration, and to interfere with a harmonious organization of the prison life in accordance with scientific principles.

Furthermore, contract labor has been a prolific cause of political corruption in this country. Prison labor is a cheap and therefore highly profitable form of labor for the employers. Consequently, the granting of the prison contracts has resulted in much bribery of the government officials and of the politicians. These contracts have constituted an important part of the "graft" of our political system.[1]

Contract labor has also given rise to much friction with the labor organizations. The products of the prison contract labor have usually been put on the market at reduced prices, and have

[1] For a description of contract labor in this country see, E. S. Whitin, *Penal Servitude*, New York, 1912.

competed with the products of the free labor. Consequently, free labor has been put at an unfair disadvantage with the cheap prison labor. Consequently, the labor unions have naturally and justifiably opposed contract labor, and have constituted a powerful factor for the state use system.

In spite of these serious objections contract labor still exists in many states, and is recognized and permitted by their constitutions and laws.[1] And yet there is some reason for believing that contract labor is prohibited by the Constitution of the United States. The Thirteenth Amendment, ratified by the states in 1865, reads as follows: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The Supreme Court of the United States has defined the meaning of the word slavery as it is used in this amendment as follows: "Slavery implies involuntary servitude — a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services." (*Plessy* v. *Ferguson*, 163 U. S. 537.)

It is evident that the Constitution expressly permits penal servitude as a form of punishment. But it is also evident that, according to the opinion of the Supreme Court which has been cited, contract labor is expressly prohibited, because it involves "the control of the labor and services of one man for the benefit of another." This constitutional question was tested recently in a case which was brought before the Supreme Court of the State of Rhode Island. Unfortunately the court decided that contract labor is constitutional, but without giving any reason for its decision.[2] It is to be hoped that this question will be

[1] According to Whitin, in 1913 the state laws permitted convict contract labor in the following states: Alabama, Arkansas, Colorado, Connecticut, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, North Carolina, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, West Virginia, Wisconsin. (*The Caged Man*, pp. 24–8.)

[2] *William Anderson* v. *Crescent Garment Co.* This case was instituted a few years ago by the National Committee on Prisons and Prison Labor. The State of Rhode Island had hired the labor of some of its prisoners to

decided before long by the Supreme Court of the United States. If the Federal Supreme Court fails to declare contract labor unconstitutional, it should be prohibited by state and federal legislation.

Educational, Religious, and Recreational Facilities

In all prisons where the inmates are not incorrigible there should be educational facilities for those who need them. This is especially important in the reformatories for the young delinquents. But it is important also for the older criminals whose education is very deficient. There should also be a library in every prison, and good current periodical literature should be circulated among the prisoners. These educational measures will materially aid some of the offenders, and especially the younger ones, to make their way in the world without falling into crime again after leaving prison, while they are not likely to help the professional criminals to become more efficient as criminals.

The opportunity to attend religious services should be furnished to the inmates of every prison. Religious worship furnishes consolation to many persons, and religion, largely through its appeal to the emotion of fear on account of its minatory features, acts as a wholesome check upon some individuals. But attendance at religious ceremonies should be optional, and no inmate should be forced to be present at such ceremonies against his will, because this would be a gross violation of the principle of religious freedom, which should be observed in prisons as much as elsewhere.

Nor is it to be expected, as many religionists erroneously assume, that religion can serve as a panacea for criminality, even in the case of the individual who is receptive to its emotional appeal and is amenable to its teachings. The religious devotee of weak character is in need of moral discipline as much as others who are not religious. Indeed, religious exaltation will sometimes unduly emphasize the emotional nature in such a fashion as to increase weakness of character.

Recreational facilities should be provided in every prison.

prison contractors, and an ex-prisoner brought suit against the contractors for wages for his labor while he was working for them in prison.

However heinous the crime of a criminal, and however incorrigible he may be, it is impossible to deprive a human being of every form of recreation and at the same time prevent him from becoming more abnormal physically and mentally. So that healthy and wholesome means of recreation should be provided, such as outdoor sports and indoor games, entertaining reading, dramatic spectacles, etc. As many as possible of these forms of recreation should be social in their character. These recreational facilities have great prophylactic value. They aid materially in solving the serious problems of discipline which arise in every penal institution.

Prison Discipline

Imprisonment is in itself a form of punishment. But it is necessary also to devize a system of prison penalties to be inflicted upon those who commit offenses within the prison. Some of these offenses are against the penal code, such as murder and assault, for which the prisoner must be tried in a criminal court and condemned to an additional penalty. But most of them are offenses against the prison administration. Inasmuch as a prison is a community by itself, it must have its own system of government, and infractions of its rules and regulations create difficult problems of discipline. This is all the more true because the prison population is by its very nature less amenable to discipline than the population at large, and therefore more prone to violate the prison rules.

The first step in developing a system of prison discipline is to ascertain the causes of the misconduct of the inmates. Heretofore prison administrators have been prone to assume that misconduct on the part of the inmates was due to their natural "cussedness," and have therefore usually failed to discriminate in inflicting penalties. But our study of the causes of criminality outside of the prisons has shown that these causes are multiple and complex, and the causes of misconduct within the prison are almost as varied. This fact indicates still more emphatically the need for a scientific management of all penal institutions. A considerable part of the discipline of a prison should be directed from the medical and psychiatric laboratories, and not from the warden's office.

The preliminary classification of the criminals will reveal many important facts about their misconduct in prison. For example, the misdeeds of a paranoiac criminal are likely to be due to his insane delusions of persecution or of grandeur. But there are important differences between the members of the same class, and these individual idiosyncracies should be observed and noted by competent administrators who will be guided by this information in prescribing disciplinary measures.

Let us consider, for example, such a prison offense as malingering. The ordinary prison administrator usually assumes that all cases of malingering are due to the same fault, namely, laziness. But medical and psychiatric investigation has revealed the fact that malingering is due to different causes in different types and in different individuals.[1] Thus the malingerer may feign illness in order to secure drugs which gratify an abnormal appetite, or because he is a hypochondriac, or he may mutilate himself in order to arouse sympathy.[2] It goes without saying that these causes should be recognized and considered in deciding how each case of malingering is to be treated.

A scientific basis for prison discipline is all the more necessary because extensive powers must inevitably be placed in the hands of prison administrators and guards. It goes without saying that this discipline must be strict and the government of a prison must be repressive, because criminals are dangerous persons who have proved themselves to be enemies of society. Consequently, it is incumbent upon the officials in whose custody criminals are placed to protect society against them, and to execute the penalties which society has imposed upon them. But great danger is involved in placing almost unlimited power in the hands of human beings over other human beings, however much in the wrong these persons have been in their past conduct.

Consequently, prisoners should always possess the right to

[1] Dr. Lydston, who has been a prison physician, expresses the following opinion of malingerers: — "My experience leads me to believe that the malingering of convicts is in itself a manifestation of incapacity — of a lack of physical and moral fiber." (G. Frank Lydston, *Malingering among Criminals*, in the *Jour. Crim. Law*, Vol. II, No. 3, Sept., 1911, p. 388.)

[2] The causes and forms of malingering, though not in relation to prison life, are described at length in the following work: — John Collie, *Malingering and Feigned Sickness*, London, 1913.

appeal from the treatment of prison officials to a superior authority, such as a court, or a prison board having supervision over the penal institutions of a city, state, or nation. But a more effective check in the long run over the abuse of power by prison officials is scientific knowledge on the part of these officials. When they possess insight into the causes of the misdeeds of their wards, they are much less likely to be governed by unilateral theories of the inherent wickedness of criminals in general, or to be inspired by feelings of personal vengeance in applying disciplinary measures.

During the first half of the nineteenth century was developed the marking or grading system.[1] According to this system a prisoner earns good marks for good behavior and industry, and is given demerits for misbehavior. His marks and demerits then determine the privileges accorded to him, and, where there is an indefinite sentence, may also determine the time of his discharge. This system is now used in many penal institutions. The prisoners are sometimes graded according to their standing in the marking system. This system appeals to the self interest of the prisoners and induces many of them to behave themselves while in prison. But this does not necessarily indicate reformation on the part of a criminal, because a dangerous criminal may be shrewd enough to behave himself while in prison to gain privileges thereby, but will commit quite as heinous crimes after leaving prison. On the other hand, an occasional criminal or a criminal by passion may find it difficult to adjust himself to the prison routine, though there is little danger of his committing criminal acts again after leaving prison.

Self Government in Prisons

One of the most promising features of present day prison reform is the effort to develop self government among prisoners. It is possible to appeal to most criminals both on altruistic and on egoistic grounds to assume some of the responsibility for their conduct within penal institutions. The grading system has sometimes been carried to the point where the more trust-

[1] This system was developed by Captain Alexander Maconochie, superintendent of English prisons in Van Dieman's Land (Tasmania), and Sir Walter Crofton, director of Irish prisons.

worthy prisoners have been placed upon their honor and have been trusted with certain privileges. The principle of self-government carries the honor system further, and organizes all the prisoners or a part of them into a social unit which is held responsible for the conduct of its members. Thus the responsibility of a prisoner becomes in part social as well as individual. By violating the regulations of the institution he endangers not only his own privileges, but also those of his fellows. In this fashion the social and altruistic traits of the criminal are encouraged to develop.

It goes without saying that complete self government can never be attained in a penal institution. The ultimate seat of authority must always remain in the hands of the prison administration. The amount of self government which can safely and profitably be granted must depend upon the nature of the inmates of an instiution. In an asylum for insane or feeble-minded criminals it may be possible to grant little or no self government. In a reform school for very young delinquents comparatively little self government may be possible. But in a prison for adult criminals, many of whom are occasional criminals and few of whom are incorrigible, it is feasible to introduce a considerable measure of self government. In such a prison the inmates may be permitted to elect a council of their own which is given the power to legislate with respect to certain matters, and to try and punish the inmates for certain offenses.[1]

Self government almost invariably decreases greatly the number of infractions of the prison rules, for the inmates are afraid of losing their cherished privileges. So that it solves many of the difficult problems of discipline for the prison administrators. Furthermore, it furnishes the prisoners an admirable training in self control and social responsibility, and prepares them for their later life in society at large. At the same time the prisoners must never be permitted to forget the strong hand of the prison administration, for otherwise attempts to escape will become frequent, while a lax administration may lead eventually to a general uprising of the inmates.

[1] For descriptions of self government in American prisons see the following books: — B. G. Lewis, *The Offender*, New York, 1917, especially Part I, Chapters VIII and IX; T. M. Osborne, *Society and Prisons*, New Haven, 1916, especially Chapter IV.

Sex Problems in Prisons

One of the most difficult problems of prison administration arises out of the strict segregation of the sexes which is inevitable in penal institutions. It is needless to say that the sexual instinct gives rise to a normal impulse for sexual intercourse which craves satisfaction in all adults. Consequently, it is inevitable that when sexually mature individuals are suddenly and rigidly cut off not only from sexual intercourse, but also from association of any sort with the opposite sex, mental and sometimes physical disturbances as well are certain to arise in many of these individuals. The result is that onanism (masturbation), homosexuality, and other forms of sexual perversion are always prevalent among both male and female prisoners. Furthermore, many other prison offenses are due to the drastic repression of sex in prison life. This repression is likely to have the gravest effect upon those who have been accustomed to regular sexual gratification previous to imprisonment.

Unfortunately few prison administrators and reformers have comprehended the true nature of this situation, and many of the most stupid errors and gravest brutalities of prison management have arisen out of this lack of comprehension.[1] Most of these administrators and reformers have regarded these sexual abnormalities as arising solely out of the moral perversity of their unhappy victims, and have subjected them to cruel repressive

[1] It is strange indeed that few references are made to this important phase of prison life in criminological literature. This is doubtless due in part to prudishness, as well as to a failure to appreciate its significance. Even those who have described their own prison life have failed to describe this feature of prison life. This is probably due in part to prudishness, but also to prudential considerations. A notable exception is the anarchist Berkman, who spent fourteen years (1892–1906) in the Western State Penitentiary of Pennsylvania near Pittsburgh for attempting to kill Henry C. Frick. This prison is conducted in the main upon the principle of solitary confinement, which is peculiarly prone to develop these sexual abnormalities. According to Berkman's graphic account the administration of this prison was brutal in the extreme. (Alexander Berkman, *Prison Memoirs of an Anarchist*, New York, 1912.)

Berkman devotes three chapters of his prison memoirs to the development of sexual abnormalities in prison, namely, Chapter XV on "The Urge of Sex"; Chapter XXVII on "Love's Dungeon Flower"; and Chapter XLIII on "Passing the Love of Woman." The last is especially important, since it describes the evolution of homosexuality in prison.

measures. The first step in dealing with this serious problem is to ascertain the causes of sexual abnormality in each case in which it is detected. This involves, in the first place, discovering whenever possible whether or not the prisoner possessed this abnormality before entering the prison. In the second place, it is essential to ascertain the forces in the prison life which have caused or have accentuated this abnormality.

Sexual abnormality can never be entirely prevented in prisons, because prison life itself is highly abnormal. Consequently, the only ultimate solution for this problem is the abolition of the prison system, which I shall discuss in the following chapter. But a number of prophylactic measures can be taken to reduce the amount of sexual abnormality as much as possible. The prisoners should be fed healthful food which will not stimulate the sexual functions unduly, but not drugs which will depress these functions, as is done in some prisons. They should have plenty of opportunity for healthy exercize in work and in play, so that they will go to bed each evening physically tired.

The hours of recreation should be passed as far as possible in association with each other, and engaged in entertaining and profitable pastimes. Furthermore, they should be given instruction as to the harmful effects of abnormal sexual habits. But this instruction should not be based upon alleged moral principles, but upon biological and psychological facts. They should be warned as to the injury these habits will do them not only in prison but after they leave prison, in case these habits become firmly fixed upon them.

It may be desirable to segregate those who become firmly established in such habits, in order that they shall not be furnishing bad examples to the other prisoners. Furthermore, any prisoner attempting to instigate another to acquire such a habit should be punished. But there should be no penalty for the sexual abnormality itself. Such penalties are unjust and therefore brutal, and are almost certain to do harm in the end. On the contrary, each patient should be given the sort of psychiatric and medical treatment which will be most helpful to him, in order to aid him to overcome the habit if possible. By these measures only can abnormal sexual habits be reduced to any appreciable extent in prisons.

The Prison Psychosis

The abnormal character of prison life is prone to develop a peculiar kind of psychosis in some of the prisoners, and this psychosis is likely to develop into insanity. In a review of studies of prison insanity made in Germany two psychiatrists have described the factors which give rise to the prison psychosis in the following words: — "The inmate of a reformatory who spends most of the day in company with other prisoners, or in the open, and who as a whole leads during his imprisonment a more rational life than that which his poor home surroundings or his vagabond existence afforded him, will seldom develop a mental disorder as the result of his imprisonment. . . . In contrast, however, to the workhouse or reformatory, the penitentiary, with its long term sentence, its solitary confinement, its hard labor and enforced mutism, its monotonous occupation and severe discipline, its entire mode of life favorable for the development of anemia and phthisis, furnishes greater opportunity for the development of mental disorders." [1]

These authors state that the occasional criminal and the criminal by passion apparently develop insanity more frequently than the habitual criminal, because it is more difficult for them to adapt themselves to prison life, and the emotional shock is greater for them. This explanation is doubtless true so far as it goes. But it should be supplemented by the statement that habitual criminals, who should preferably be called professional criminals, have passed through a process of selection which has weeded out those who are likely to become insane. In other words, the criminals who are predisposed to insanity are likely to become insane while they still are occasional criminals, and before they have had time enough to become professional criminals.

The Prison Type

The prisoners who develop the prison psychosis may be regarded as belonging to the "prison type." [2] This is a more or

[1] Paul Nitsche and Karl Wilmanns, *The History of the Prison Psychoses*, New York, 1912, p. 13. See also W. A. White, *A Prison Psychosis in the Making*, in the *Jour. Crim. Law*, Vol. IV, No. 2, July, 1913, pp. 237–246.

[2] A widely advertized, popular prison reformer of the day, after a silly

less genuine psychiatric entity which is certain to be brought into being by any prison system. It is, however, hopeful to note in the above citation that the factors emphasized are solitary confinement, mutism, monotony, etc. As these features are eliminated from prison life, the prison psychosis will doubtless become more and more rare.

It must not, however, be thought that this is the only prison type. The recidivist, long inured to prison routine, may not develop the prison psychosis. But he is sure to acquire certain mental complexes which are more or less peculiar to prison life, and which will always serve to differentiate him somewhat from persons who have never lived for long periods of time in a prison. We know very little as yet about the mental complexes which are acquired in prison. When they have been carefully studied by psychologists and psychiatrists, they will throw a flood of light upon the effects of prison life upon mind and character.

and senseless diatribe against criminologists, expresses the opinion that "while there is no such thing as a criminal type, there is a 'prison type.'" (T. M. Osborne, *Society and Prisons*, New Haven, 1916, p. 27.) But because of his ignorance of the science of criminology, which he contemns, Mr. Osborne fails lamentably to give a satisfactory description of the prison type.

CHAPTER XXVII

A SCHEME OF PENAL TREATMENT

Prison evils — Houses of detention — Local jails — Reception and observation prisons — Types of penal institutions: reformatories; colonies; asylums; penitentiaries — Release and after-care — Substitutes for imprisonment — Corporal punishment — Restitution — Sterilization.

THE penal problem is fundamentally a problem of the manipulation of human character. Inasmuch as the criminal has by reason of his anti-social conduct forfeited his right to freedom, it becomes the function of the state to prescribe in almost every detail the conditions of his existence. With the exception of the rearing of the young, there could be no better opportunity for endeavoring to develop human character along useful social lines. For this reason I have insisted throughout this discussion upon the necessity of utilizing scientific methods in penal treatment, and of applying the principle of the individualization of punishment, which requires a careful study of each criminal in order to ascertain his peculiar needs.

PRISON EVILS

Penal institutions as they now exist in this country and in other civilized countries fall far short of attaining the ideal suggested above. Many of them are built in such a fashion as to be insanitary and needlessly uncomfortable for their inmates. The administration of most of them is either harsh and brutal, or, to say the least, does not lend itself readily to the individualization of punishment. The contract labor system vitiates the management of some of them. It is no wonder that under these conditions many criminals are more dangerous to society when they leave prisons than when they entered them. In each of these cases society has lost a valuable opportunity to improve human character.[1]

[1] Prison conditions are described in many writings of which I will mention the following:—Clarissa Olds Keeler, *American Bastiles*, Washington,

It goes without saying that these evils should be removed. Prisons should be well built, so that they will be sanitary and healthful and moderately comfortable. Prison administration should be humane and intelligent, as well as strict. The contract labor system should be abolished. Nor must it be thought that these reforms will make prisons attractive places for criminals. Even under ideal prison conditions imprisonment continues to be a punishment, for there are very few if any human beings who like to have their lives regulated to the extent that is necessary in a prison.

But it is essential to go further, and to outline a system of penal institutions which will successfully apply the principle of the individualization of punishment. Some of the features of such a penal system are already foreshadowed in the more progressive penal institutions of today, but many of them we can only predict and surmise.

Houses of Detention

Houses of detention, such as police stations and local jails in so far as they are used for purposes of temporary detention, are not penal institutions. But they are prisons in the sense that persons are temporarily detained in them in the interest of society. However, it is essential to bear in mind that many of these persons are not criminals. They are defendants in criminal cases who will be acquitted, and some of them are witnesses. Consequently, these places should be sharply differentiated from penal institutions, and should be known as houses of detention. Each person detained should be given a small but comfortable room and not a cell. He should not be placed under unnecessary surveillance, and should not be forced to associate

1910; *Our Penal System and Its Purposes*, published by the *Galveston-Dallas News*, Texas, 1909; C. A. Ellwood, *A Bulletin on the Condition of the County Jails of Missouri*, University of Missouri, 1904.

Prison life and conditions have been described from within by many inmates and former inmates of whose writings I will mention the following:—D. Lowrie, *My Life in Prison*, New York, 1912; A. Berkman, *Prison Memoirs of an Anarchist*, New York, 1912; J. Hawthorne, *The Subterranean Brotherhood*, New York, 1914; F. Martyn, *A Holiday in Gaol*, London, 1911; A. Cook, *Our Prison System*, London, 1914; "John Carter," *Prison Life as I Found It*, in *The Century Magazine*, Vol. LXXX, No. 5, September, 1910, pp. 752–758.

with other detained persons. In small communities the house of detention may be under the same roof with the local jail, but should be separated from it internally.

These measures are necessary in order to do justice to those who are forcibly detained, but who are not necessarily guilty of any offense. It is well for each person to bear in mind that at some time or other he may find himself detained in one of these houses. But they are also necessary for the protection of the public. If a house of detention is not sanitary, it may act as a potent force to spread infectious diseases throughout the community. If the inmates are not kept carefully segregated, it will serve to spread moral contamination throughout the community. In other words, a house of temporary detention should be constructed and managed upon the theory that it is going to be used for the healthy and the innocent as well as for the diseased and the criminal. This theory has frequently been ignored, and these houses have usually been regarded as penal institutions.

Local Jails

Local jails are needed for short term sentences under six months in length, or one year at most. These jails should be well built and comfortable. Some work should be required of the inmates, but it is not possible in these jails to introduce an elaborate system of labor and of compensation for the prisoners. In some cases these jails have been located upon a farm or adjacent to a stone quarry where work not requiring much training can be carried on. These institutions should be used only for adult offenders. As short sentences are gradually abolished and other minor penalties introduced, the need for local jails will disappear in course of time.

These local jails and workhouses have been among the worst penal institutions in this country,[1] partly owing to the difficulty of carefully supervizing them. It has been suggested that

[1] Many of the foreign delegates at the International Prison Congress in Washington in 1910 expressed themselves as astonished and shocked at the condition of many of our local jails and workhouses. (See, for example, Ugo Conti and Adolphe Prins, *Some European Comments on the American Prison System*, in the *Jour. Crim. Law*, Vol. II, No. 2, July, 1911, pp. 199–215.)

small communities should unite in having common local jails.[1] For example, several counties might have a jail in common instead of each having a separate jail. This jail would be much larger than the ordinary county jail, and would be administered much better because it would be possible to secure more competent officials to manage it. Instead of having a jail or workhouse in each county, the great majority of which are badly constructed and managed, it would be possible to have a few good jails in each state. This scheme will probably succeed where the counties are not widely separated, as they are in some of the Western states. It will doubtless remove many of the evils of local jails and workhouses.

Reception and Observation Prisons

Those who are guilty of serious crimes, or of persistent recidivism, should be sent first to reception and observation prisons. These prisons should be built and equipped in such a fashion as to make it possible to make a careful examination of each of these convicts. This examination should be made during a period of observation lasting from a few days to a month, and perhaps even longer in difficult cases. When the offender has been properly classified he should be sent to the most suitable institution. The reception and observation prison would therefore serve as a clearing-house for all of the penal institutions to which criminals are committed for long and indefinite terms. It might even happen in some cases that the scientific directors of the observation prison would recommend to the court that a form of penal treatment other than imprisonment was desirable.

Types of Penal Institutions

It is obviously impossible to provide a special prison for every conceivable type of criminal. But there will doubtless be the following principal groups of penal institutions with as many subdivisions as seems necessary: —

1. Industrial reform schools and reformatories.
2. Industrial and farm colonies.

[1] See, for example, L. N. Robinson, *The Solution of the Jail Problem*, in the *Jour. Crim. Law*, Vol. VI, No. 1, May, 1915, pp. 101–103.

3. Asylums for the insane, the feebleminded, and the inebriates.

4. Penitentiaries for the incorrigible.

The reform schools and reformatories should be for the youthful offenders who give promise of reform. To these institutions also might be sent some of the high-grade feebleminded who are capable of receiving industrial training.

To the industrial and farm colonies should be sent the mature occasional criminals and criminals of passion who are not committed to the local jails for short sentences. But the principal types of offenders for these institutions should be vagrants and recidivists who ordinarily commit petty offenses. The maximum length of their sentences should vary according to the number of offenses they have committed.

The criminal asylums should be for the distinct abnormal and pathological types. There should be an asylum for the criminal insane, one for the criminal aments, and one for the criminals who are inebriates. Some of the insane criminals, and some of the inebriates may be cured and can be released with safety. But the remainder are incurable, and should be permanently incarcerated like the criminal aments.

Many of the incorrigible criminals will be sent from the reception prison to these asylums. But the criminals who do not belong to a distinct psychiatric type, and whose careers have shown that they are in all probability incorrigible, should be sent to penitentiaries, where they will be kept for long terms and in some cases permanently. As the specialized institutions become more fully differentiated, there will be a constantly decreasing number of incorrigible criminals to be sent to the penitentiaries. These incorrigibles will probably be in the main professional criminals who are too long habituated to a criminal career to be able to change.

In some of the penal colonies have developed convict communities which have acquired a considerable degree of autonomy. In some of these communities the convicts are permitted to marry and raise families, to carry on their own industries, and sometimes to govern themselves to a large extent. To these communities are sent the convicts who have been sentenced for life or for long terms, and who have made good records in the first few years of their imprisonment. This is an excellent

method of dealing with some of these criminals, and such community life should be developed as far as possible in every prison system.[1]

Political and evolutive offenders should be distinguished from common criminals in all penal institutions, however severe may be the punishment inflicted upon them. This distinction may be made by housing these offenders in a separate building wherever this is possible, by subjecting them to a different régime, etc.

Release and After-Care

However good institutional treatment may be, it may fail if the inmate is not released at the right time, and is not given suitable after-care. There should be a competent parole authority capable of discerning the proper moment for the release of each prisoner between the minimum and maximum limits prescribed by the law. The prisoner may be readily injured by being kept in prison either too short a time or too long a time. A parole board having in its membership representatives of the prison administration and of the judicial system is probably the best authority for deciding the time of release.

The parole board should also exercize a watchful care over the convict for a time after he is released. In the first place, it should maintain an employment bureau through which to secure positions for the discharged prisoners. Otherwise the ex-convict is likely to fall back again into a life of crime through lack of employment. In the second place, the parole board should exercize supervision over the expenditure of the wages which the convict may have accumulated while in prison. In the third place, the board should keep a record of the career of each ex-convict for some years after he leaves prison, in order by means of these statistics to test the success of imprisonment and of parole. At the same time the ex-convicts should not be subjected to an irksome surveillance, for this may hamper them

[1] The French convict community in the penal colony of New Caledonia has been described in the following book: George Griffith, *In an Unknown Prison Land*, London, 1901. The Philippine convict community known as the Iwahig Penal Colony on the Island of Palawan has been described in the following article by the Director of Prisons in the Philippine Islands: W. H. Dade, *The Prison System of the Philippines*, in *The Delinquent*, Vol. VI, No. 19, October, 1916.

greatly in their later careers by revealing their prison records to the world, and by humiliating them unnecessarily.

Substitutes for Imprisonment

But imprisonment should not be the ideal of penal treatment. In the preceding chapter I have stated the defects inherent in imprisonment. I have shown that prison life can never be a fair test of fitness for life in society at large. Consequently, it should be the aim of every penal administration to diminish as rapidly as possible the use of imprisonment as a form of punishment. It will never be possible to abolish imprisonment entirely, because there will always remain a residuum of criminals who are so dangerous to society that it is necessary to incarcerate them for the protection of society. But substitutes should be devized as rapidly as possible for most of the forms of imprisonment.

Some of these substitutes are already being tried. Enforced labor on roads, farms, etc., with a small compensation, is being used in several countries as a form of penal treatment for petty offenders and criminals who furnish promise of reformation. Labor under custodial care should be used much more as a form of penal treatment.[1]

Corporal Punishment

Corporal punishment has been used extensively in the past, and is sometimes advocated today not so much as a substitute for imprisonment but in addition to it. In fact, flogging has recently been made a penalty for procuration in England, and for wife-beating in some states in this country. The romantic notion that it is a poetic penalty doubtless has much influence upon the minds of many of the advocates of corporal punishment. I have already pointed out in Chapter XXII that poetic penalties frequently are inefficacious. There is no more reason for applying corporal punishment to procurers and wife-beaters than to other criminals, for economic and psychopathic factors are causes of procuration and wife-beating just as they are causes of many other kinds of crime.

[1] This method is being used in several states in this country, such as Colorado, Vermont, Oregon, etc., and in Ontario in Canada. See *Good Roads and Convict Labor*, published by the *New York Academy of Political Science*, New York, 1914.

Corporal punishment is almost invariably brutalizing not only to its victims but also to those who administer it. Furthermore, it is likely to arouse sadistic and masochistic feelings and impulses which should be rigorously suppressed. Any one acquainted with the causes and history of flagellation is well aware of the close connection between corporal punishment and these abnormal sexual tendencies.[1] Consequently, corporal punishment should not be tolerated by the law in any penal system, except possibly for a few young offenders for whom it should be prescribed by competent scientific authorities.

The brutalizing effect of corporal punishment upon the public at large must also be remembered. For the same humanitarian reasons that capital punishment should be abolished, corporal punishment should be prohibited. It is inconceivable that its use as a substitute for imprisonment can be extended.

Restitution

One of the best substitutes for imprisonment is restitution. Whenever possible an offender should be forced to make reparation to the victim of his crime. In the case of theft the thief should be forced to repay at least in part what he has stolen. In the case of a crime against the person the criminal should be required to indemnify his victim at least in part for the injury he has done to him. In some cases restitution may be sufficient for punitive purposes. In other cases it may well constitute a part of the penal treatment.

Enforced reparation has an excellent psychological and moral effect upon the offender. It impresses upon his mind in a direct and concrete fashion the nature of the injury he has caused another person. It indicates to him the inevitable consequences of his conduct to others, and thus teaches him his social and moral responsibilities. It therefore has great educational as well as punitive value.[2]

[1] Numerous books have been written about flagellation, and there is much information upon this subject in psychiatric literature. A good recent discussion of corporal punishment is to be found in the following book: — H. S. Salt, *The Flogging Craze*, London, 1916.

[2] Herbert Spencer pointed out the pedagogical significance of this principle more than half a century ago in his treatise on education. See the chapter on "Moral Education" in his *Education*, New York, 1860.

Furthermore, restitution secures justice for the victims of crime who at the present time can secure no reparation without recourse to the civil law, and this recourse is usually ineffectual. It would be desirable to change many if not all of the fines now imposed as penalties into indemnities to the victims of crimes.

Sterilization

In a few states in this country laws have been enacted making sterilization a penalty.[1] One of the principal motives back of this legislation has been to prevent criminals from reproducing themselves on the theory that their criminality will be transmitted to their offspring. It is obvious that criminality *per se* cannot be inherited. Furthermore, it is hardly justifiable to use a form of mutilation as a punishment. But it is legitimate to impose sterilization when an individual has an unquestionably hereditary trait which is dangerous to society. Most of the legislation on this subject in this country violates this scientific principle, and should be revized accordingly.

Suitable forms of punishment based upon the scientific principles which have been outlined in this book must be worked out through experience. Furthermore, forms of penal treatment must vary somewhat from age to age in accordance with changing social conditions and the corresponding changes in the traits of criminals.

[1] See the reports made in 1914, 1915, and 1916 by the committee on the sterilization of criminals of the "American Institute of Criminal Law and Criminology."

PART VI

CRIME AND SOCIAL PROGRESS

CHAPTER XXVIII

POLITICAL AND EVOLUTIVE CRIMES AND CRIMINALS

The distinction between common crimes and political and evolutive crimes — Evolutive and involutive vice — Freedom of thought and of action — Political freedom — Freedom of speech — Treason and sedition — The types of evolutive and political criminals: radicals and conservatives; the pathological type; the emotional type; the rational type — The instigation of political and evolutive crimes — The treatment of evolutive crime.

It is customary in criminological writings to distinguish between common crimes and political crimes. Common crimes are acts contrary to the law committed in the interests of the individual criminal or of those personally related to the criminal. Political crimes are acts contrary to the law committed against an existing government or form of government in the interest of another government or form of government.

Common crimes committed in the course of political activities are sometimes called political crimes, such as the theft of public funds, the misuse of power by governmental officials, and other offenses against the government in the interests of individuals committed by dishonest office-holders, corrupt politicians, and others.[1] But inasmuch as these crimes are committed in individual interests, they are common crimes and not political in the criminological sense defined above.

[1] For example, Proal's book on political crime is devoted largely to a discussion of financial, electoral, and judicial corruption in governmental matters, political assassinations for individual purposes, Machiavelism, hypocrisy, demagoguery, bribery, etc., in political affairs. In so far as he discusses genuine political crimes, such as political assassinations in the public interest, the illegal acts of revolutionists, anarchists, socialists, and other propagandists for changes in society, etc., he seems inclined to regard them as common crimes. This is due to the reactionary point of view of this writer who in all his writings reveals his inability to comprehend that, as an evolutionary phenomenon, society is certain to change, and that many changes are highly desirable. (L. Proal, *La criminalité politique*, Paris, 1895; Eng. trans., *Political Crime*, New York, 1898.)

The Distinction Between Common Crimes and Political and Evolutive Crimes

Many political assassinations by regicides,[1] acts against the government committed by rebels in revolts, revolutions and civil wars, and many similar acts are political crimes. Many treasonable acts also are political crimes. They are political crimes when committed for the purpose of changing or overthrowing the existing government in the interest of the public. But they are common crimes when committed in the interests of individuals. So that it is the character of the motive back of the treasonable and illegal act which determines whether it is a political or a common crime.

It is also customary to regard as political crimes acts committed by the citizens of one state against the government of another state. Thus spying in times of peace and all warlike acts in time of war against another country constitute political crimes. They may or may not be treasonable according to the existing law of treason. They may not even be tried in criminal courts, but by military tribunals according to military law. However, in accordance with criminological usage, they belong in the category of political crimes.

It is, of course, true that all crimes are in one sense political, because they involve violations of laws which are promulgated by governments and are therefore political phenomena. But there is a genuine distinction between the crimes which are in

[1] The following are a few of the political assassinations committed during the past century: Tsar Paul of Russia in 1801, Prime Minister Percival of England in 1812, Duc de Berri of France in 1820, President Lincoln of the U. S. in 1865, Sultan Abdul Aziz of Turkey in 1876, President Garfield of the U. S. in 1881, Tsar Alexander II of Russia in 1881. President Carnot of France in 1894, Premier Stambouloff of Bulgaria in 1895, Shah Nasr-eddine of Persia in 1896, Premier Canovas del Castillo of Spain in 1897, King Humbert of Italy in 1900, President McKinley of the U. S. in 1901, King Alexander and Queen Draga of Servia in 1903, Minister of the Interior Von Plehve of Russia in 1904, Grand Duke Sergius of Russia in 1905, King Carlos and the Crown Prince of Portugal in 1908, Premier Boutros of Egypt in 1910, Minister of War Nazim Pasha of Turkey in 1913, President Madero of Mexico in 1913, King George of Greece in 1913, Archduke Francis Ferdinand of Austria in 1914.

Most of the above-mentioned assassinations are correctly designated as political crimes, while a few of them doubtless were common crimes because they were committed solely in the interests of individuals.

criminological terminology called political and the common crimes. Furthermore, there are other offenses against the law which are not common crimes, and yet are not political crimes in the usual criminological sense. These are illegal acts committed in accordance with and in defense of fundamental human rights, and in the course of various movements for bringing about more or less extensive social and economic changes in society. While these acts are in the last analysis directed against existing governments or forms of government, this is not their immediate object as is the case with ordinary political crimes. Their immediate object usually is to bring about far-reaching and fundamental moral, social, and economic changes which will in turn affect the form of the government.

Among these crimes, which are broader than the ordinary political crimes, are offenses in defense of the right to freedom of thought and belief, in defense of the right to express one's self in words in free speech, in defense of the right to dispose of one's life as in suicide, etc.; and many illegal acts committed by conscientious objectors to the payment of taxes or to military service, the offenses of laborers in strikes and other labor disturbances, the violations of law committed by those who are trying to bring about changes in the relations between the sexes, etc.

Common crimes are almost invariably anti-social in their nature, while offenses which are directly or indirectly political are usually social in their intent, and are frequently beneficial to society in their ultimate effect. We are, therefore, justified in calling them social crimes, as contrasted with the anti-social common crimes. Inasmuch as these social crimes frequently contribute to social progress, while the anti-social common crimes are opposed to social progress, Ferri has characterized the social crimes as evolutive, as contrasted with the involutive or atavistic anti-social crimes.[1] In similar fashion Maxwell

[1] "There exists an atavistic and an evolutive criminality. The first is the common criminality such as is shown in the muscular and atavistic form, strictly speaking, or the spurious form, a form modern and modified by evolution. The second is the politico-social criminality which, under one or the other of the two forms, tends (in a more or less illusory way) to hasten the future phases of politico-social life." (E. Ferri, *Criminal Sociology*, Boston, 1917, p. 335.)

has designated these two groups of crimes as the anterograde and retrograde crimes.[1]

A similar distinction can be made between evolutive and involutive vice. Conduct which is injurious to the body and mind must at all times and places be regarded as vicious as soon as its injurious effect is discerned. Such vice is involutive and antisocial in its character. But many forms of conduct have been stigmatized as vicious, owing to magical notions, religious beliefs, and conventional moral ideas, which have eventually proved to be harmless and frequently beneficial. In such cases the alleged viciousness of persons guilty of these forms of conduct must be regarded as evolutive and social.

Freedom of Thought and of Action

It may be said, generally speaking, that the great majority of political and evolutive crimes are committed in behalf of freedom of thought or of freedom of action. It is true that occasionally political crimes are committed by reactionaries who are opposed to freedom, but these are comparatively rare for the obvious reason that those in favor of more repression are not likely to oppose the repressive measures already in force.

Freedom of thought and freedom of action are closely related and shade into each other almost imperceptibility. It may appear at first sight as if freedom of thought is inalienable because the mental processes of every one are internal, and are perforce free from any direct supervision and control from outside. But practically speaking freedom of thought is of little value if not accompanied with certain forms of freedom of action. If people are not permitted to communicate their thoughts to each other, there will be lacking the exchange of ideas and information, and the freedom of discussion which is the most powerful stimulant of all kinds of thinking.[2] Furthermore, thinking leads inevitably to forms of belief, religious or otherwise, which necessitate cer-

[1] "Il y a donc deux aspects dans la criminalité; comme je l'ai indiqué, il y a une criminalité rétrograde, et une criminalité antérograde; celle-là représentant des moeurs condamnés par l'évolution, celle-ci des moeurs qui se généraliseront plus tard." (J. Maxwell, *Le concept social du crime*, Paris, 1914, p. 52.)

[2] *Cf.* W. Bagehot, *Physics and Politics*, New York, 1884. See especially Chapter V entitled "The Age of Discussion."

tain forms of action, so that freedom of thought implies more or less freedom of action. Thus freedom of thought implies, to say the least, freedom of speech; freedom of publication in the press, in books, etc.; and freedom of belief, religious or secular.[1]

Freedom of action has been greatly limited in the past, and still is limited in many important respects. In the past there has been an enormous amount of regulation of the details of daily life by means of sumptuary legislation. This legislation prescribed the clothing, food, etc., of the people. Most of this legislation has disappeared in civilized countries, though it crops out occasionally in the form of prohibitions against the use of alcoholic beverages, drugs, etc.

In this chapter I shall describe the social and evolutive crimes which assume a political form, that is to say, which are aimed directly at the government or rulers. In the following chapter I shall describe the social and evolutive crimes which are not aimed directly at the government or rulers, and are, therefore, only indirectly political in their form.

Restrictions upon Freedom

There still is much limitation of political freedom, even in civilized countries. Wherever power is held by hereditary monarchs and aristocracies, this power is a limitation upon the political freedom of the remainder of the population. Out of this power arise the unjust special privileges of monarchs, such as the laws against *lèse majesté*. There is no reason why monarchs should be immune from criticism any more than other mortals. They are entitled only to the protection of the laws against slander and libel which belongs to all.

Whenever the suffrage is limited to one sex, the denial of the right of suffrage to the members of the other sex is a limitation upon their political freedom. All special political privileges

[1] Excellent descriptions of the nature and history of the freedom of thought are given in the following works—: J. M. Robertson, *A Short History of Freethought*, London, 1906, 2 vols.; J. B. Bury, *A History of Freedom of Thought*, London, 1913. Both of these writers describe the ways in which Christianity has restricted the freedom of thought in the occidental world, and the forces which have opposed Christianity. They also point out the dangers to freethought which still exist, and which may restrict it in the future.

may be regarded as limitations upon the freedom of those who are discriminated against. There is, nevertheless, justification for limiting the political rights and powers of the young and the mentally deficient, because of the obvious incapacity of these classes for exercizing these rights and powers. But there can be no justification for limiting the political freedom of any other groups, with the possible exception of a few of the criminals who may be regarded as having forfeited their right to such freedom. This means a democracy in the political world in which all persons have the same rights and powers with the exception of the above-mentioned groups.

Some of the restrictions upon the freedom of speech doubtless are justifiable and inevitable. It is inconceivable that the time will ever come when it will not be necessary to restrict freedom of speech and publication when it leads to the making of false statements about persons in the form of slander and libel, because such statements constitute gross violations of individual rights and liberties. Furthermore, it will always be necessary to prohibit fraudulent statements. The laws against slander, libel, and fraudulent statements are absolutely necessary to protect the rights of the individual against the malice and intent to injure of other persons.

It will also be necessary always to have at least a few restrictions upon the freedom of speech when it is used for the purpose of inciting common crimes. It is inevitable that a government should prohibit incitement to crime, for it would manifestly be inconsistent for a government to prohibit certain acts, and then to permit persons to do all in their power to induce others to violate these prohibitions. But a law forbidding incitement to crime should be carefully worded so as to include only direct incitement to crime, and should never be construed by the courts so as to include statements or deeds which might indirectly lead to crime. Such a law should also never be used to suppress criticism of the wisdom of any law, or agitation for the repeal of a law. Furthermore, whenever it is evident that a person has incited others to criminal acts in the belief that the laws which make those acts criminal are wrong, or that these acts are necessary for the furtherance of a desirable social or political movement, this person should be tried and penalized as an evolutive and political offender, and not as a common criminal.

The laws against treason are inevitable in any political state, because a government must create and enforce such laws for its own self preservation. But such laws should make treasonable only overt acts directed towards the overthrowal of the state, and not offenses against the royal family, etc., as is true in some countries. The laws against treason in this country are fairly liberal, and probably deserve no criticism. The restraint with which they were applied after the Civil War did much credit to the government of this country.

The laws against treason and sedition acquire special importance in war time. During a war a country is in a position of great danger from its external foes. Consequently, it is essential that these laws be executed with great rigor upon its internal foes, whereas in times of peace it is possible to treat treasonable offenses with comparative leniency. But there is also danger of these laws being stretched too far in time of war, so as to cover criticisms of the policy of government and of the men in power, which may be made with the utmost loyalty to the country and which may have great utility in exposing defects in the conduct of the war by the government. While a censorship of information having military value is essential for the prosecution of a war, a censorship of opinions under the laws against treason is intolerable in a democratic state.

Political assassination should be suppressed rigorously, as has been done when capital punishment has been imposed upon the assassins of presidents of the Republic. In similar fashion should be repressed other attacks upon life and property for political reasons by anarchists, etc.[1]

But there are other limitations of political freedom which are not justifiable. It goes without saying that anarchism is

[1] For example, in 1915, a bomb was placed in Saint Patrick's Cathedral, New York City, by anarchists. In this case, however, it was disclosed in the course of the trial that the police department had used an *agent provocateur* to instigate ignorant and weak-willed young anarchists to make this attempt, so that the responsibility for this criminal attempt to blow up the Cathedral apparently rested in part upon the police.

On July 22, 1916, a bomb was thrown at the military preparedness parade in San Francisco which killed at least six persons and wounded twenty-five or more other persons. (See *New York Times*, July 23, 1916.) At the time of the present writing this case is still being tried in the criminal courts, and it is still uncertain as to who was responsible for this bomb outrage.

utterly impracticable and impossible, and that violent attempts by anarchists to overthrow the state should be sternly suppressed. But in this country there has been a tendency to repress unduly the expression of anarchistic opinions and ideas. This repression has sometimes been legal and sometimes illegal. However mistaken these opinions and ideas may be, there is no justification for suppressing their expression. This tendency has gone so far that it has endangered the right of asylum for political offenders from other countries, because of the laws which have been passed against the admission to this country of anarchists and other political offenders.

There are other limitations upon political freedom which are examples of symbolism gone wild under the name of patriotism. For example, in the New York penal code it is forbidden to use the national or state flag for purposes of advertisement or to "publicly mutilate, deface, defile, or defy, trample upon, or cast contempt, either by words or act, upon any such flag." (Article 134.) Under this provision of the penal code an agitator for international socialism in New York City who had published a cartoon in behalf of internationalism in which the national flag was represented was sent to prison for thirty days on June 3, 1916, for thus desecrating the flag.[1]

In 1916 in Tacoma, Washington, a man was convicted of "libelling" a patriotic hero because he had referred to George Washington as a "slaveholder and inveterate drinker." [2]

Freedom of speech has also frequently been suppressed illegally in this country. Again and again it has happened that the police and sometimes the courts have prevented the propagation of unpopular views by restricting the right of assemblage and in other ways.[3] While the laws against unlawful assembly are necessary and desirable in so far as they are directed against assemblies for the express purpose of violating the law, they

[1] Case of *The State* v. *Bouck White*. In March, 1917, the same defendant and several co-defendants were sent to prison in New York City for having burned the United States flag in a religious ceremony.

[2] See *The New York Times*, June 4, 1916.

[3] Numerous cases of unlawful suppression of free speech and free assemblage have been described, as, for example, in J. G. Brooks, *Freedom of Assemblage and Public Security*, in the *Papers and Proceedings of the Am. Sociological Society*, Vol. IX, Chicago, 1915, pp. 11–28; T. Schroeder, *Free Speech for Radicals*, 2d ed., New York, 1916.

have frequently been construed as prohibiting assemblies held for the purpose of disseminating radical ideas, or assemblies which might conceivably result in disorder, though through no fault of the organizers of the assembly.

As a matter of fact, experience has furnished abundant evidence that when no restrictions are placed upon the rights of freedom of speech and freedom of assemblage, except in so far as it is necessary to protect the traffic on the public highways from interference, there is much less danger of disorder than when such restrictions are imposed. Under freedom the wise and practicable ideas receive a deserved publicity, while the foolish and dangerous ideas are less likely to do harm when those who hold them are given an opportunity to blow off steam than if they are kept bottled up. This has been true and may be so still in Boston, where freedom of speech and of assemblage has been tested on the Common. It seems to be true at the present time (1917) in New York, though it has not always been true in this city where police commissioners have frequently indulged in unlawful suppression of the rights of freedom of speech and of assemblage. For many years freedom of speech and of assemblage has been permitted with excellent results on Sunday afternoons at Hyde Park in London.

The Types of Evolutive and Political Criminals

Let us now consider briefly the traits of the evolutive and political criminals. According to political and social conditions, any one may become a criminal of this type. Under certain conditions a conservative may be such a criminal, under other conditions a radical may be the criminal. A monarch is the incarnate personification of conservatism, and yet Charles the First in England and Louis the Sixteenth in France were beheaded as political criminals. Both the religious and the irreligious may become such criminals. There is perhaps nothing in human culture more archaic than religion. And yet under the French Revolution the clergy were proscribed as criminals.

However, as a general rule, the evolutive and political criminals belong to the more progressive and radical portion of the community. The reason for this is apparent. The conservatives are interested mainly if not solely in maintaining the established

order. So that they are not likely to come into conflict with the existing laws. It is usually only when a great revolution is successful and sweeps the progressives and radicals into power that the conservatives become the criminals in the eye of the new order. But the progressives and the radicals, on the contrary, are constantly trying to bring about changes, and are, therefore, very likely to come into conflict with the existing laws. So that, while any kind of person may conceivably at some time or place become an evolutive or a political criminal, we are justified in assuming that the principal type or types of evolutive and political criminals are to be found among the progressives and radicals.

We can distinguish three principal types of evolutive and political criminals, namely, the pathological, the emotional, and the rational types. Insanity of different sorts and other forms of mental morbidity are more or less prevalent among these criminals. This is specially true of the regicides or regenticides who assassinate monarchs, and the magnicides who kill any persons who are in authority or who have attained public prominence. It is also true of those who by throwing bombs, exploding mines, and in other ways kill innocent people in public places. Some of these assassinations are obviously common crimes committed by insane criminals. For example, an insane person may kill a public official because he is laboring under the delusion that he is being persecuted by this official. Or he may assassinate a prominent person or throw a bomb in a public place in order to attract the attention of the public to himself, thus gratifying his inordinate vanity. Or he may commit one of these crimes as an indirect method of committing suicide, since he has not sufficient physical courage to kill himself.

But some of these mentally unbalanced criminals doubtless are of the political type. This is the case when an insane person has, through reading anarchistic and revolutionary literature or in some other way, acquired the notion that a monarch or the president of a republic or a prime minister or a prominent editor is partly or wholly responsible for the woes of mankind, and that the most effective method of relieving these woes is to assassinate the guilty party. Or an insane person may throw a bomb in an opera house or in a restaurant under the delusion that he is killing members of the class which is responsible for

human misery. Or he may kill people in a public place regardless of their innocence, or destroy property regardless of its ownership, under the delusion that he will thereby precipitate the revolution that will bring into being the utopia which mankind is awaiting.

Many other examples of the pathological type of evolutive criminal might be mentioned, as when a religious delusion leads an insane person to practise human sacrifice. The mental morbidity of these pathological criminals is readily discovered by means of a psychiatric and medical examination. But it is usually clearly indicated beforehand in the obvious falsity of their ideas, and in the folly of the measures they use to attain their ends. Their methods are usually of the utmost violence, involving the taking of human life and the destruction of property, and are almost certain to react injuriously upon the cause for which they are striving. Furthermore, in some of these crimes there may be mixed some of the motives of the common criminal, such as vanity, personal spite, the desire to die without the courage to kill one's self, etc.[1]

It is impossible to draw a hard and fast line between the pathological and the emotional types. It is evident that most if not all of the pathological offenders are highly emotional. But there are others who also are very emotional, and yet can hardly be regarded as pathological. In fact, it is probable that the majority of the evolutive and political criminals are of the emotional type, without being distinctly pathological. The reasons for the predominance of the emotional type can be easily discerned. Strong feelings constitute a powerful dynamic

[1] Many writers have described the pathological traits of evolutive and political criminals. Nearly every political assassination, bomb outrage, and like event has produced a number of such writings which have contributed to the valuable store of data upon this subject. A number of general works also have been published. The following are a few of the general and special writings on this subject: — C. Lombroso and R. Laschi, *Le crime politique et les révolutions*, Paris, 1892, 2 vols.; E. Régis, *Les régicides dans l'histoire et dans le present*, Lyons, 1890; E. C. Spitzka, *Regicides, Sane and Insane*, in the *New York Medical Journal*, August 15 to September 5, 1903; C. F. MacDonald, *The Trial, Execution, Autopsy and Mental Status of Leon F. Czolgosz, Alias Fred Nieman, The Assassin of President McKinley*, in the *American Journal of Insanity*, Vol. LVIII, No. 3, January, 1902; W. Channing, *The Mental Status of Czolgosz, The Assassin of President McKinley*, in the *American Journal of Insanity*, Vol. LIX, No. 2, 1902.

force which may readily impel those possessing them into committing these offenses, whereas phlegmatic and calculating individuals are more likely to lack this impulse.

Furthermore, some of the emotions in this type of offender are of the sympathetic type. These sympathetic emotions give rise to compassion for human misfortunes and a desire to ameliorate them. This desire may become a veritable passion, and thus lead to offenses similar to the common crimes of passion due to altruistic feelings. These altruistic common crimes are committed in behalf of another individual, as, for example, the crime of a mother in behalf of her child, of a lover in behalf of a loved one, etc. They entail doing harm to persons other than the objects of the altruism, and usually display a lack of social consciousness on the part of the criminal.[1]

Many of the evolutive and political offenses also are altruistic crimes of passion. But they are committed in the interest of the whole or of a considerable portion of society. There is not the same narrow personal element in these offenses which is present in the common crimes. Lombroso was so impressed by the likeness between many political offenses and crimes of passion that he classified the political offender as a subtype under the criminal by passion. But, while this similarity doubtless exists, it is preferable to classify them separately for the reasons indicated above.

[1] Vallon and Genil-Perrin have described a number of altruistic crimes of the common type. Among these crimes are thieving in behalf of another, homicide in the interest of a third person, homicide committed in the supposed interest of the victim by fanatics and persons suffering from melancholia and the mania of persecution, euthanasia, indirect automutilation in the place of suicide, etc. They point out the anti-social character of these crimes in the following words: —

"Le sentiment altruiste n'est donc ni bon ni mauvais. Ce qui est mauvais, c'est de ne pas être capable d'en régler l'exercice; ce qui est bon, c'est de l'asservir, comme toutes nos autres tendances, à notre volonté consciente. . . . Tout comme l'égoïsme irrefréné, l'abandon aux impulsions altruistes peut acquérir un caractère antisocial. Nous venons de faire allusion à quelques péchés véniels de l'altruisme dont nous pouvons nous rendre coupables tous les jours. Mais si nous avons pu en faire comprendre la portée, c'est grâce à l'étude des manifestations, à la fois pathalogiques et criminelles, de l'émotion tendre, que nous avons poursuivie dans ce travail." (Ch. Vallon and G. Genil-Perrin, *Crime et altruisme,* in the *Arch. d'anth. crim.*, Vol. XXVIII, 1913, p. 186.)

At the same time it must be borne in mind that some of the evolutive and political criminals are intensely individualistic and egoistic, and, therefore, to that extent unsocial, if not anti-social. In fact, some of their offenses are so egoistic that it becomes a serious question whether they should not be regarded as common crimes. The only thing that preserves their character as evolutive crimes is that they are apparently committed in accordance with a sincere belief in certain principles of conduct and of social organization.

Both of these emotional types are to be found, for example, among the anarchists. Some of the anarchists possess strong social feelings, and seem to arrive at their anarchistic philosophy from a social point of view. Other anarchists are inordinately egoistic and individualistic, and advocate a program which is intensely unsocial if not anti-social. Their anarchism apparently arises out of a conscious or sub-conscious desire to be free from social restraint. These temperamental differences exist even when the underlying philosophy of the anarchists is apparently the same. However, both of these types of offenders may display strong passions indicating the presence of powerful feelings, though these may take different directions.[1]

The offenders of the rational type are by far the least numerous. The reasons for this can be readily discerned. Persons in whom the reasoning faculty is highly developed are relatively cool and deliberate in their conduct, and do not usually act upon the impulse of the moment. Consequently, they are not likely to try to bring about changes by means of violence, except as a means of last resort, but try usually to accomplish their ends peacefully and, so far as possible, within the limits of law and order. They are, perhaps, even more prone than persons of the emotional type to see the defects in the existing order. But they use constructive rather than destructive means to remedy these defects.

It must not be thought, however, that these persons of the rational type are lacking in emotions. In many cases their

[1] The anarchists have been described in many books, a few of which I will mention here:—E. Sernicoli, *L'anarchia e gli anarchici*, Milan, 1894, 2 vols.; E. V. Zenker, *Anarchism*, New York, 1897; E. Zoccoli, *L'anarchia*, Turin, 1907; P. Latouche, *Anarchy*, London, 1908; E. A. Vizetelly, *The Anarchists*, London, 1911.

affective nature is doubtless as fully developed as in persons of the emotional type. Their altruistic feelings, their humanitarian impulses, and their social consciousness are quite as strong as those of the emotional persons. But these affective tendencies are guided better by the reason and controlled more effectively by the will than in the emotional persons.

There are, however, times when conditions become so intolerable that even the most self-controlled persons are driven to violate laws in order to bring about changes. At such times offenders of the rational type become much more numerous. Thus under a brutal autocracy or bureaucratic oligarchy university students become tyrannicides, and many of the political offenders are drawn from the educated classes.[1]

I have already stated that there are a few crimes on the borderline between common crimes and evolutive crimes. It also happens from time to time that a common criminal pretends to be an evolutive or political criminal in order to secure immunity from punishment or a lighter penalty. But these cases are rare, since such attempts are usually made only by the most clever of the professional criminals, and not frequently by them since they are liable to acquire thereby an undesirable publicity. When such attempts are made by pathological individuals, they are either on the borderline or can be easily detected as common criminals.

The Instigation of Political and Evolutive Crimes

It also happens that some of the alleged evolutive and political crimes are committed as a result of the activities of the *agents provocateurs*. These are police spies who are detailed to instigate crimes among persons who are ignorant and suggestible, and who frequently are mentally unbalanced as well, who have acquired a smattering of radical and revolutionary ideas. These agents are sent into labor unions, socialist organizations, anarchist groups, and wherever these weak individuals may be found. It is, of course, incumbent upon the police to watch these radical and revolutionary groups in order to repress vio-

[1] Such a situation has existed in modern times in Russia. See, for example, E. Tarnowski, *Les crimes politiques en Russie (1901–1903)*, in the *Arch. d'anth. crim.*, Vol. XXII, 1907, pp. 40–57.

lent attacks upon life and property. But unscrupulous police officials will sometimes try to incite members of these groups to crime in order to secure the financial rewards and glory resulting from the repression of these crimes. Wherever there is a strongly centralized autocratic and bureaucratic government, these spying methods are likely to be used in order to bring public condemnation upon the radicals and to intimidate them from activity.[1]

But even more sinister than this spying by police agents are the activities of a certain type of private detective agency which has become prevalent recently, at any rate in this country. There is much evidence now available to prove that these agencies are frequently hired by employers, capitalists, and other wealthy individuals to instigate crime among radicals, to spy upon agitators and to try to secure their conviction in criminal courts, to furnish special guards at times of labor disturbances, to act as strike-breakers, etc.[2] All of these activities are well

[1] The activities of the *agents provocateurs* in various European countries have been described in many books, as, for example, the following: — P. Kropotkin, *The Terror in Russia*, London, 1909; A. Bebel, *My Life*, Chicago, 1912; G. J. Holyoake, *Sixty Years of an Agitator's Life*, London, 1900.

[2] *Cf.* R. Hunter, *Violence and the Labor Movement*, New York, 1914. Hunter gives a good description of the activities of these private detective bureaus in this country, especially in Chapter XI entitled "The Oldest Anarchism." He says that "to-day there exist in the United States thousands of so-called detective bureaus where armed men can be employed to do the bidding of any wealthy individual. While, no doubt, there are agencies that conduct a thoroughly legitimate business, there are unquestionably numerous agencies in this country where one may employ thugs, thieves, incendiaries, dynamiters, perjurers, jury-fixers, manufacturers of evidence, strike-breakers and murderers. A regularly established commerce exists, which enables a rich man, without great difficulty or peril, to hire abandoned criminals, who, for certain prices, will undertake to execute any crime. If one can afford it, one may have always at hand a body of highwaymen or a small private army. Such a commerce as this was no doubt necessary and proper in the Middle Ages and would no doubt be necessary and proper in a state of anarchy, but when individuals are allowed to employ private police, armies, thugs, and assassins in a country which possesses a regularly established state, courts, laws, military forces, and police, the traffic constitutes a menace as alarming as the Black Hand, the Camorra, or the Mafia. The story of these hired terrorists and of this ancient anarchy revived surpasses in cold-blooded criminality any other thing known in modern history. That rich and powerful patrons should be allowed to purchase in the market poor and desperate criminals eager to commit any crime on the calendar for a

calculated to lead directly or indirectly to many common crimes, while by increasing the incentives to violence on the part of radical groups and the workers and by aggravating the bitterness of feeling between the different classes they increase the number of evolutive and political crimes. These activities both of the police agents and of the private agencies stimulate crime, hinder social progress, and constitute a grave menace to free institutions.

The Treatment of Evolutive Crime

The preceding exposition of the nature of evolutive and political crime and of the traits of those who commit these offenses has shown the importance of dealing in an appropriate manner with this type of crime and of criminal. Special provision should be made in law and procedure for distinguishing these offenses from ordinary crimes. As I have already pointed out in earlier chapters, there should be a special tribunal for the trial of these offenders, and special methods of restraining and punishing them. Up to the present time there has been a lamentable failure to do any of these things in this country.

few dollars, is one of the most amazing and incredible anachronisms of a too self-complaisant Republic." (*Op. cit.*, pp. 281–282.)

The ex-convicts and thugs employed by these detective agencies have been used in many recent labor disturbances, such as the strikes in the West Virginia and the Colorado mining districts.

CHAPTER XXIX

EVOLUTIVE CRIME AND SOCIAL READJUSTMENT

The significance of evolutive crime — Religious restrictions upon freedom — Christianity as the national religion — The laws against blasphemy and profanity — Sabbatarian legislation — Religious discrimination in military conscription — Sumptuary and economic legislation — The law against suicide — Repression in matters of sex and reproduction — The conservatism of the human mind — The prevention of evolutive crime: flexibility in the organization of society — Evolutive crime and democracy.

Evolutive crimes have been committed ever since the beginning of governments and law. Custom, public opinion, religious beliefs, moral ideas, and laws at any given time and place prescribe certain forms of conduct, and a more or less fixed mode of living. These forces maintain the prevailing régime, and invariably present much opposition to change. Consequently, in order to bring about change it frequently becomes necessary for some individuals to defy these forces for permanence, and in some cases this defiance involves violation of the law. So that evolutive crime is an inevitable concomitant of social change and progress.

The Significance of Evolutive Crime

In fact, the emergence and treatment of evolutive crime epitomize in a measure the perennial conflict between the forces for change and the forces for permanence in social evolution. The repression of this type of crime frequently comes from tyrants, monarchs, oligarchies, and small ruling classes to whose interest it is to preserve the existing system. Consequently, this kind of repression often results in tyrannicide and regicide. But even when no tyrant or oligarchy happens to be dominant, the widely diffused conservative influences of custom, religion, and morality as embodied in the law are certain to furnish more or less repression. So that the repressive forces are always present.

In addition to being inevitable, the repression of evolutive crime is to a certain extent useful. It is useful, in the first place, because law and order in general must be maintained in the long run, whereas if there was no repression whatever, a state of anarchy would soon arise. In the second place, at least a small amount of repression is usually of value for the preservation of the existing social order, because, while no social system is ideal, it has rarely ever been feasible to change immediately from one system to another.

On the other hand, such repression may readily overstep the bounds of social utility, and, as a matter of fact, this happens frequently. Excessive repression almost invariably reacts unfavorably upon the existing system, and is liable to create an intolerable situation in which temporary disorder becomes preferable to order. Then comes a sudden explosion in the form of a revolt, revolution, civil war, *coup d'état*, etc., which overthrows the repressive forces, and brings about changes in the social system.

So that repression of evolutive crime has, on the one hand, been useful in checking foolish attempts at change. These attempts are foolish in some cases because the conditions are not yet ripe for the proposed changes, and in other cases because the attempted changes are hopeless of attainment under any conditions. On the other hand, this repression has hindered social progress considerably by putting obstacles in the way of desirable changes which were feasible.

It is very important that the public should understand clearly the distinction between evolutive and common crimes, and should recognize the evolutive crimes which are most prevalent in the present stage of social evolution. A general understanding of this distinction would help greatly in deciding how much repression of evolutive crime is desirable, and what are the wisest methods of dealing with evolutive criminals.

Religious Restrictions upon Freedom

In this chapter I shall describe briefly some of the laws which suppress evolutive crimes in this country, and a few recent instances of such suppression. Some of these laws are necessary, and their enforcement is justifiable. Other laws are absolutely

unjustifiable. Furthermore, in some cases suppression has taken place without even a legal sanction.

Nothing in human culture is more archaic than religion, because it professes to teach absolute truth, and to inculcate immutable rules of conduct. Consequently, religion has always been a powerful force for repressive legislation, and therefore a prolific cause of evolutive criminality. Even in this "land of liberty" one religion has become an official institution to such an extent as to give rise to many evolutive crimes.

Freedom in matters of religion must necessarily include the right to express one's opinions about religion. Laws which prohibit any one from questioning the existence of a god, from denying the divinity of Jesus, or from giving expression to any other religious or irreligious belief are gross violations of this right. Indeed, this right should be held so inviolable that it would not be abridged even indirectly. And yet this occurs every time the Christian religion is officially recognized as the national religion of this country. It is obvious that a genuine and consistent application of the principle of religious freedom, which is embodied in our Constitution, requires that there should be no official or national religion branded upon every citizen, but that each citizen should be left free to choose his own religion for himself, or to remain irreligious.

Christianity as the National Religion

Christianity has been officially recognized as the national religion in many ways. This happens every time that an official function is accompanied by a religious ceremony, as, for example, when Congress is opened with prayer. It is recognized in Thanksgiving Day proclamations by the President and in many other state documents. But the United States has been judicially declared to be a "Christian" country in numerous decisions of many of the highest courts of the land, a few of which I will cite.

In order to understand the historical background of these decisions it will be well to recall a few facts of English legal history. Early in the development of English law the Christian Scriptures came to be read into the common law by a curious process which has been described in numerous historical works

and in the writings of Thomas Jefferson,[1] but which there is not the space to describe here. As a result of this singular occurrence, Christianity was recognized in many judicial decisions as a part of the English law. About the seventeenth century Hale stated that "Christianity is parcel of the laws of England," (1 Ventr. 293, 3 Keb. 607). In 1763 Blackstone said that "Christianity is part of the laws of England," (*Commentaries*, IV, 59). In 1767 Lord Mansfield, in Evans' case, said that "the essential principles of revealed religion are part of the common law." As a consequence of these decisions, blasphemy and profanity came to be regarded as offenses at common law.

The English common law has been incorporated more or less fully into the law of every state except Louisiana. Consequently, these English decisions have furnished precedents for the American decisions on this point. For example, the Supreme Court of the United States declared in the case of *Vidal* v. *Girard's Executors* (2 How. 127, 198), that "it is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania." In the case of the *Church of the Holy Trinity* v. *U. S.* (Oct. Term, 1891, U. S. Reports, Vol. 143), the decision of the Supreme Court, prepared by Justice Brewer, recites many facts alleged to be indications that this is a Christian country, and then concludes as follows: — "These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation."

In numerous blasphemy cases similar decisions have been made, as will be illustrated in the two following cases from state courts. In New York in *The People* v. *Ruggles* (8 Johns. 29, 294, 295), Chancellor Kent rendered the following decision: — "The people of this state, in common with the people of this country, profess the general doctrines of Christianity, as the rule of their faith and practice; and to scandalize the author of these doctrines is not only, in a religious point of view, extremely impious, but, even in respect to the obligations due to society, is a gross violation of decency and good order." In Delaware in *The State* v. *Thomas Jefferson Chandler* (General Sessions, May Term, 1837, Harrington's Reports, Vol. 2), the following assertion was made: — "We know, not only from the oaths that are administered by our authority to witnesses and jurors, but from that evidence to which every man may resort beyond these walls, that the religion of the people of Delaware *is christian*."

[1] Jefferson's description of this process is to be found in any complete edition of his writings. A brief summary of it is given in *The Jeffersonian Cyclopedia*, edited by J. P. Foley, New York, 1900, pp. 161–162.

It is interesting to note that some of these judges have apparently had qualms of conscience over these decisions, or at least misgivings as to their effect upon religious freedom, for they have averred that in recognizing Christianity as the official and established religion they were not opposing religious tolerance and freedom. Thus in Pennsylvania in *Updegraph* v. *The Commonwealth* (11 S. and R. 394, 400), the court spoke as follows: — "Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; . . . not Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men." In New York in *Lindenmuller* v. *The People* (N. Y. Supreme Court, February, 1861, Barbour's S. C. Rep., Vol. 33), the plaintiff in error had been convicted of violating the sabbath law by giving a theatrical performance on Sunday. The conviction was sustained and in rendering its decision the court spoke as follows: — "Religious tolerance is entirely consistent with a recognized religion. Christianity may be conceded to be the established religion, to the qualified extent mentioned, while perfect civil and political equality, with freedom of conscience and religious preference, is secured to individuals of every other creed and profession."

Enough decisions have been cited to indicate that in speaking of this country as a "Christian" nation the courts have not intended merely to use a descriptive phrase, which might be justified on the ground that the great majority of the inhabitants are Christian. On the contrary, it is evident that they have fully intended to establish Christianity as the official, national religion, in whose favor the executive and legislative branches of the government may discriminate when they so desire. But the courts have apparently not intended to establish any Christian church as the official state church.

The Constitution of the United States and the State constitutions guarantee religious liberty.[1] It is, therefore, contrary to the spirit if not to the letter of this constitutional provision

[1] The first amendment to the Federal Constitution reads as follows: —

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Article I, Section 3 of the New York State Constitution reads in part as follows: —

"The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this State to all mankind."

for the executive, the legislative, or the judicial branch of the government to discriminate in any way in favor of any religion. Especially grave is this discrimination when the courts declare this to be a "Christian" nation. By this astonishing piece of affrontery they indirectly, to say the least, violated the constitutional right of religious freedom which it is their special duty to uphold. They have thereby insulted the many non-Christian religious citizens and the irreligious citizens of this country who should vehemently resent this gratuitous insult.[1]

Unfortunately it is true that in nearly every country in the world some religion is officially recognized or is given a preference by the government. But there can be the least excuse for this in the greatest republic in the world. So far as my personal observation extends, the French government is the only democratic government which consistently refrains from recognizing any religion as the official or national religion.

The Laws against Blasphemy and Profanity

The way in which religion restricts the freedom of speech is clearly exemplified in the laws against blasphemy.[2] In the days when it was generally believed that the blasphemous utterances of an individual would bring divine punishment not only

[1] The late Justice Brewer of the U. S. Supreme Court repeatedly misused the great power and influence of his high judicial office by asserting in public decisions and private utterances that this is a "Christian" nation, as, for example, in the following statement: — "It is in that sense as truly a Christian nation as is England with its Established Church, or as is Turkey a Mohammedan nation with the Koran as its officially declared sacred book." (D. J. Brewer, *American Citizenship*, New York, 1909, p. 21.)

I am glad to be able to say that a Jewish non-Christian has had the courage and the intelligence to make a forceful and convincing reply to Brewer's implied aspersions upon all non-Christian citizens of this country. (Isaac Hassler, *A Reply to Justice Brewer's Lectures "The United States a Christian Nation,"* Philadelphia, 1908.)

[2] Blasphemy has been defined by an American legal authority as follows: "*Blasphemy* is any reproach, oral or written, wilfully cast upon God, his name, attributes, or religion. Any words calculated and designed to impair and destroy the reverence, respect, and confidence, due to God as the creator, governor, and judge of the world, such as a denial of his being or providence, or any profane and malicious scoffing at the Holy Scriptures, exposing them to contempt and ridicule, or any other declarations which tend to subvert religion and piety, are blasphemy. *Profanity* consists in the use of words which import an imprecation of future divine vengeance." (W. C. Robinson, *Elementary Law*, Boston, 1882, pp. 298–299.)

upon himself but upon his community as well, there seemed to be ample social justification for penalizing blasphemy. But the doctrine of individual responsibility for conduct is now firmly established, and there are few if any intelligent persons who believe that any one besides the blasphemer himself can suffer for his sin. Indeed, some of the most devout votaries of theistic religion have reached the conclusion that the deity can be safely left alone to enforce the "divine" law.[1] To the impartial and unprejudiced mind of the scientist and of any other person who is undisturbed by any theological prepossessions it appears wholly reasonable to assume that, if the deity is indeed omnipotent, as is alleged by his devotees, he can scarcely need the puny assistance of man in performing his police work. So that the human and social justification for the suppression of blasphemy disappears.

It is doubtless true that profanity has frequently been penalized by the courts partly because it has been regarded as symptomatic of excited feelings which might lead to acts of violence dangerous to other persons. But while a court may be justified in penalizing a person who utters sentiments which menace the welfare and safety of others, there is no justification for punishing profanity on religious grounds. So that the law should provide and a court should specify that in such a case a threat is being penalized, and not profanity.

There is even less justification when a court punishes profanity partly as a violation of "good taste." In such a case profanity is penalized as an offense against the persons whose standard of taste proscribes profanity as being a form of "bad taste." Few things in human culture are more indefinable and more mutable than standards of taste. Consequently, a standard of taste is one of the last things that a court should attempt to enforce, and it is a dangerous abuse of its power when it does so. So that while profanity may very well be in bad taste under many circumstances, because it signifies an undue lack of ap-

[1] For example, Patterson, who displays a profound faith in a "divine" law, insists that it is not the function of man to enforce this law. "The municipal law does not and cannot, and it would be impious for it to attempt to, enforce most parts of the divine law, and it can only punish in an imperfect manner the violation of a small part of it." (James Patterson, *Commentaries on the Liberty of the Subject and the Laws of England Relating to the Security of the Person*, London, 1877, Vol. I, p. 114.)

preciation for the feelings of others, the penal law is not the appropriate agency for restraining it.

There can be no question about the right of every one to use as expletives any words he chooses, so long as these words do not imply slanderous statements about any other living persons. As a matter of fact, profanity frequently has great psychological value in that it furnishes an outlet for strong feelings which might otherwise be manifested in an injurious fashion. Commonplace words cannot perform this function, so that words purported to have a sacred significance must be used. These words possess great cathartic value in furnishing a fairly innocuous vent for strong feelings.

But the most dangerous feature of the laws against blasphemy is that they may be used to limit the freedom of speech and of belief with respect to questions of great importance. As a matter of fact, these laws have been invoked more or less frequently by the courts to limit the freedom of discussion with respect to religious and so-called religious matters. As recently as the year 1916 an obsolete law was revived in Connecticut for the purpose of prosecuting and convicting a man who had criticized the character of the Hebrew Jehovah as painted in the Old Testament.[1] Disrespectful mention of God, Jesus, and other alleged supernatural beings is prohibited in various parts of this country, in spite of the fact that these beings are reputed to be strong enough to defend and avenge themselves. In this fashion is violated the fundamental and inalienable human right of free speech, and the courts are furnished the power to interfere, if they so desire, with the spread of liberal ideas and the refutation of archaic beliefs.

[1] *The State of Connecticut* v. *Mockus*. The defendant was prosecuted in Waterbury, Connecticut, under the following law which was originally enacted in 1642: — General Statutes of Connecticut, Section 1323 — "Every person who shall blaspheme against God, either of the persons of the Holy Trinity, the Christian religion, or the Holy Scriptures, shall be fined not more than $100 or imprisoned in a jail not more than one year, and may also be bound to his good behavior." A. D. 1642–1821, Revised, 188, Section 1535.

Under this "blue law" he was convicted and sentenced in August, 1916, to serve ten days in jail and to give a bond of $1,000 to guarantee good behavior for six months. The case was appealed and has not been decided at the present time of writing (1917).

Even in England where the right of free speech has been carefully safeguarded, the law provides that any one "who having been educated in or at any time having made profession of, the Christian religion within this realm, by writing, printing, teaching, or advised speaking, denies the Christian religion to be true, or the holy scriptures of the Old and New Testament to be of Divine authority" [1] is guilty of a misdemeanor. Nor is the law against blasphemy in England a dead letter, as is pointed by an English historian: — "It was commonly supposed that the Blasphemy laws, though unrepealed, were a dead letter. But since December, 1911, half a dozen persons have been imprisoned for this offence." [2]

Sabbatarian Legislation

There are many other direct or indirect violations of the principle of religious freedom, in the form of discriminations in favor of religion and of Christianity in particular and against irreligion and the irreligious. For example, in the New York penal code disturbing religious meetings is made a special crime, it is forbidden to carry on horse racing within two miles of a religious meeting place, it is forbidden to represent the "Divine Person" by living characters, etc.[3] In 1914 in New York City a man was sent to prison for six months because he disturbed a religious meeting by uttering some radical sentiments, though he did nothing to disturb the peace. In the same year in New York City another man was sentenced to prison for one year because he led a group of unemployed men into a church in search of assistance. Both of the judges who imposed these sentences indicated by their utterances that they regarded the guilt of these offenders as greatly exacerbated by the fact that they had invaded churches, and that consequently they were increasing the penalties accordingly.

Perhaps the most flagrant violation of religious freedom in this country is in the form of sabbatarian legislation. Many kinds of conduct are forbidden on Sunday. For example, in the New York penal code all labor, "excepting the works of ne-

[1] J. F. Stephen, *A Digest of the Criminal Law*, London, 1904, p. 127, Art. 181.

[2] J. B. Bury, *A History of Freedom of Thought*, London, 1913, p. 243.

[3] *Article* 186. See *Cook's Criminal Code*, Albany, 1916.

cessity and charity," is prohibited on Sunday; public sports are prohibited on Sunday; theatrical performances are prohibited on Sunday; barbering is prohibited on Sunday, with certain exceptions; etc.[1]

Now it goes without saying that a day of rest once a week, if not even more frequently, is desirable for every one, and should be guaranteed by the law to all persons who cannot secure it otherwise. It was a recognition of this fact that led to the wise French law of the *repos hebdomadaire* (weekly rest) enacted in 1906.[2] But it is not essential that this day of rest should come on Sunday for all persons. Nor is it necessary to forbid the doing of anything on Sunday, so long as every person is assured of his day of rest.

In this country a recognition of the need of a day of rest has doubtless been one of the motives back of sabbatarian legislation. But the religious motive has probably been much more powerful. This is revealed both by the pious wording of the laws and also by their nature. If the day of rest was the sole motive of the legislation, it would not be required that all or as many as possible should desist from work on Sunday. If the sole motive of the legislation was to make Sunday a day of rest and recreation, it would not be necessary to prohibit public sports, theatrical performances, etc. In fact, these activities constitute a valuable addition to Sunday as a day of rest and recreation. These prohibitions are, as a matter of fact, reminiscences of taboos imposed upon certain days for magical and religious reasons, from one of which days Sunday has been derived.[3] It is time that a purely secular law of the weekly rest be substituted for our present Hebraic and Christian sabbatarian legislation.

Religious Discrimination in Military Conscription

A recent instance of discrimination in favor of religion and the religious against the irreligious is to be found in the "Selective

[1] *Article 192.*

[2] For a thoroughgoing description of this law, see, C. Berthomieu, *Le repos hebdomadaire*, Paris, 1914.

[3] For a scholarly discussion of the derivation of Sunday, see, H. Webster, *Rest Days*, New York, 1916. See also, E. Westermarck, *The Origin and Development of the Moral Ideas*, London, 1908, Vol. II, pp. 286–289.

Draft Law" of 1917. In this law it is provided that members of "any well-recognized religious sect or organization organized and existent on May 18, 1917, and whose then existing creed or principles forbade its members to participate in war in any form and whose religious convictions are against war or participation therein, in accordance with the creed or principles of said religious organization," should be exempted from military service. (Quoted in the *New York Times*, July 15, 1917.)

In other words, the religious objectors to military service belonging to an established church were to be exempted, while the irreligious objectors, however conscientious they might be, and the religious objectors who did not happen to belong to an organized church were not to be exempted. While it is very essential at a time of great national peril that the conscientious objectors to military service should not be encouraged, and especially that the shirkers who try to hide under the cloak of conscientious scruples should be baffled; it is nevertheless grossly unjust to discriminate in favor of a few religious sects. It would have been better to exempt no conscientious objectors than to exempt only the religious objectors.

The draft law of 1917 also exempted regular or duly ordained ministers of religion and students of divinity. While it is essential to exempt workers engaged in industries necessary to the national existence and the successful prosecution of the war, the priestly class is one of the least needed of all professions at all times and can be dispensed with most easily at a time of national stress and peril. So that this exemption is obviously a discrimination in favor of religion.

Sumptuary and Economic Legislation

There are comparatively few sumptuary laws in any civilized country today. Most sumptuary legislation is utterly unjustifiable. The only possible exceptions are the prohibitions against the use of deleterious substances, such as alcohol, the narcotic and hypnotic drugs, etc., which unquestionably are doing human beings a vast amount of injury. But aside from a few such exceptions, people should be left free to eat, sleep, and clothe themselves as their own judgment and taste dictate, and not according to the dicta of legislators and judges.

There is much limitation of economic freedom, though there is great difference of opinion as to what constitutes economic freedom. According to the *laissez faire* school economic freedom consists in placing no restriction whatsoever upon competition. It is the application of this principle which, in a large measure, has led to the present capitalistic system. According to the socialists economic freedom can be attained only by the organization of all economic activities by the state, so that each individual will be given an equal opportunity with all others. Neither of these forms of economic freedom exists at present. So that, whichever view we choose to take, we have reason to believe that there is much limitation upon economic freedom.

Inasmuch as it is very difficult to define economic freedom, it is difficult to determine what limitations upon it are justifiable. The most that I can say here is that freedom in the economic world can in all probability be attained and maintained most effectively by means of a form of democracy akin to that in the political world. At any rate, there is much reason to believe that the economic freedom of the *laissez faire* school is in the main a spurious form of freedom which leads very soon to some of the worst forms of bondage. So that repression, or, to say the least, restriction, of such things as speculation, monopolies, some forms of competition, etc., is probably justifiable.

Offenses are committed in connection with economic movements which are justly suppressed. For example, in 1892 Alexander Berkman tried to assassinate Henry C. Frick, head of the Carnegie Steel Company in Pittsburgh, because of Frick's activities in attempting to defeat the Homestead strike. Berkman's intentions probably were good, but his methods were very reprehensible. Consequently, he spent about fourteen years in prison on account of the attempted assassination.[1]

In 1911 and 1912 about forty labor leaders were sent to prison for dynamiting a large amount of property and destroying a number of lives in the effort to injure employers against whom they had grudges because they maintained an open shop or for some other reason. Among these were the notorious McNamara brothers who were sent to prison in California for long terms, J. B. McNamara for life and J. J. McNamara for fifteen years,

[1] See, for his own account of this act, Alexander Berkman, *Prison Memoirs of an Anarchist*, New York, 1912.

for blowing up the Los Angeles Times building and killing twenty-one persons.[1] It is difficult to determine whether the McNamaras were genuine evolutive offenders or nothing more than common criminals. In either case, severe punishment was the only kind of penal treatment which could be justly meted out to them.

On the other hand, legislation, court injunctions, and police measures have frequently been used to prevent workingmen from striking, and to check other economic movements, such as socialism, the single tax, etc. It goes without saying that there can be no justification for such repression when these movements are being carried on in an orderly fashion.

The Law Against Suicide

While it is desirable to discourage suicide as much as possible by indirect means, there can be no possible justification for penalizing any one for attempting to destroy his own life, since there could be no right more fundamental and more inalienable than the right to dispose of one's own life. And yet suicide is penalized practically everywhere. For example, the New York penal code specifies that "every person guilty of attempting suicide is guilty of felony, punishable by imprisonment in a state prison not exceeding two years, or by a fine not exceeding one thousand dollars." (Article 202.)

The punishment of attempted suicide is based in large part upon the theological notion that only God has the right to take away life which he is alleged to give. But it is also partly for the prevention of suicide. For this purpose it is a grossly stupid measure. It can obviously be of no avail whatsoever in deterring any one so desperate as to wish to kill himself. It may, indeed, increase the number of suicides by driving those who are contemplating suicide to adopt more certain methods of killing themselves in order to avoid the penalty prescribed for those who fail in the attempt, but which obviously cannot be inflicted upon those who succeed. Punishment may sometimes be justifiable for trying to avoid moral obligations, where an attempt at suicide was obviously for that purpose. But punishment for suicide itself can never be justified.

[1] See W. J. Burns, *The Masked War*, New York, 1913.

I do not mean to imply, however, that society does not have the right to take life, as in capital punishment, or to endanger life, as by means of military conscription in time of war, when the safety of society imperatively demands it. It goes without saying that the fundamental right of the individual to his own life must give way in some cases to the welfare of society.

Repression in Matters of Sex and Reproduction

There is much limitation of freedom in sex relations. This is well illustrated in the laws against fornication, adultery, bigamy, etc., and in the laws enforcing the existing type of marriage, and restricting and sometimes absolutely prohibiting divorce. Freedom in matters of reproduction is also limited. Rarely if ever is the attempt made to force reproduction. But throughout a large part of the civilized world there is repressive legislation against the use of measures for the prevention and control of reproduction. Furthermore, the public discussion of sex is prohibited to a large extent by the laws against obscenity.

There is not the space to discuss at length these restrictions in matters of sex and reproduction. Suffice it to say that sex relations have varied greatly in the past and are changing considerably at the present time. There is ample evidence that artificial regulation of reproduction is greatly needed by society, because of the danger of relative over-population.[1] So that there is no justification for most of these penal restrictions, as, for example, the laws against fornication, adultery, and birth control. Furthermore, while some forms of obscenity may violate good taste, the laws against obscenity grossly violate the freedom of speech, and have frequently been used to suppress both works of art and scientific treatises which deal with sex.[2]

[1] I have presented some of this evidence in my *Poverty and Social Progress*, New York, 1916. See especially Chapter XIII entitled "Population and Poverty."

[2] Theodore Schroeder has described many instances of such suppression in his "*Obscene*" *Literature and Constitutional Law*, New York, 1911. He points out that the censorship which has arisen under the laws against obscenity has prevented the publication of many useful scientific books. "The most injurious part of this censorship, however, lies not in the things that have been suppressed, as against the venturesome few who dare to take a chance on the censorship, but rather in the innumerable books that have remained unwritten because modest and wise scientists do not care to spend

The Conservatism of the Human Mind

Before closing this chapter I wish to discuss briefly the question as to the extent to which evolutive crime can be lessened and eliminated. Freedom of speech and of publication would eliminate many evolutive crimes, for a large proportion of these crimes are due to the restrictions upon freedom of speech. It is conceivable that such freedom will become possible, with the few exceptions which have been mentioned, namely, the prohibitions against slander and libel, against fraudulent statements, and against direct incitements to crime. It would then be possible to propose, discuss, and advocate any changes which seemed desirable to any one, and thus prepare the way in a peaceful manner for their ultimate adoption or rejection as seemed best to the majority.

But while freedom of speech will doubtless increase greatly with the progress of civilization, it is not certain that it will ever escape a limitation which arises out of a well known human trait. It is unfortunately true that the great majority, owing to mental inertia, are unwilling to expend the effort necessary to assimilate new ideas, but, on the contrary, display a passionate devotion to generally accepted ideas. Consequently, it is to be feared that those who propose and advocate new ideas will always suffer a certain amount of persecution at the hands of the majority. It is possible that all legal restrictions upon free speech will disappear eventually. But extra-legal restrictions will doubtless always remain in the forms of the persecution of and discrimination against those who advocate new ideas and agitate for changes in the organization of society.

The Prevention of Evolutive Crime

The prevention of evolutive crime depends mainly upon the development of a political, social, and economic organization which is sufficiently flexible to make changes easy without at the same time leading to disorder. Evolutive crime will be

their time in taking even a little chance of coming into conflict with an uncertain statute, arbitrarily administered by laymen to the medical profession, in which profession are many not over-wise and sometimes fanatical zealots in the interest of that asceticism which is the crowning evil of the theology of sex." (*Op. cit.*, p. 73.)

eliminated to the extent that such an organization comes into being. It is doubtful if such an organization can ever be attained in an ideal form. But human society seems to be approximating it more and more closely with the progress of civilization.

At any rate, this is true of political organization. There has been a distinct tendency in this direction through the development of constitutional and democratic government. A democracy is bound to uphold, in the long run, the rights of the individual, for the source of authority in a democracy is, in the last analysis, in the individuals who constitute the democracy. Consequently, the constitutions of all democratic states guarantee more or less fully the rights of free speech, of free press, of freedom of belief, and of free assemblage. Unfortunately these rights are frequently violated in practise.

But even the modern democratic, constitutional government is not so flexible as it might be, and as would be desirable. This is lamentably true in this country which is supposed to lead the world in its democratic and republican institutions. It is necessary merely to refer to the extreme difficulty of amending the United States Constitution to reveal the degree of rigidity in our political system. In fact, this difficulty alone is to a large extent at the bottom of the rigidity in our governmental system, for if it were easier to amend the Constitution the whole system would become more flexible.[1]

Partly as a result of the rigidity of the Constitution, as well as because of the great powers given to them by the Constitution,

[1] The rigidity and the consequent dangers of our constitutional system are periodically revealed in our presidential elections. It is a notorious fact that in two elections, in 1876 and in 1888, the candidates who received a plurality of the popular vote did not receive a majority of the votes cast in the electoral college. Consequently, the minority candidates were seated in the presidential chair. In 1876, this injustice nearly led to civil war, and there is danger of this happening after each election. In 1916 the candidate who received a plurality of the popular vote nearly failed to receive a majority of the votes cast in the electoral college. And yet it is almost impossible to change the method of electing the president because of the difficulty of amending the Constitution.

The same difficulty stands in the way of many other political changes which should be made because of the great transformation in economic and social conditions which has taken place since the Constitution was adopted.

the courts have acquired an enormous amount of power in this country. By construing it liberally they have sometimes relieved somewhat the rigidity of the Constitution. But because of the nature of the training and the class consciousness of most of the judges they have also served as serious obstacles to change.[1] The courts have frequently used their power politically, in effect, to legislate. In many cases their attitude has been reactionary, and has been manifestly in the interest of the upper classes. These facts doubtless account for the recent agitation to check the courts by means of the popular recall of judicial decisions and of judges. It is indeed dangerous to a country when its courts acquire so great a power, and such a situation contains within it the seeds of class conflict and civil strife which may become widespread.[2]

[1] Schofield has furnished a scholarly description of the development of the constitutional right of the freedom of the press in this country. (H. Schofield, *Freedom of the Press in the United States*, in the *Papers and Proceedings of the Am. Sociological Society*, Vol. IX, Chicago, 1915, pp. 67–116.)

But he points out also how this right has been unlawfully restricted by the courts in the following words: —

"The constitutional declarations of liberty of the press are original works of the American people in the sphere of law and government. Their chief practical bulwark always has been the overthrow of the Federalist party because of the Sedition act of 1798. As guardians and expounders of the declarations the courts are a failure up to date. They cannot be a success until judges get rid of the notion that the declarations are only declaratory of the anti-republican English common law of the days of Blackstone, Lord Mansfield, and Lord Kenyon, only previous censorship of publications on matters of public concern, leaving untouched the English common law of seditious, blasphemous, defamatory, obscene, and immoral libel. The judge-made liberty of the press to publish defamatory falsehood on matters of public concern is unauthorized judicial legislation destructive of men's reputations and property, inviting and encouraging the owners and editors of newspapers and periodicals to found their educational power on falsehood, whereas the declarations require them to found it on truth, except when the legislature sees fit to remove the restraint of truth. And the judge-made law of contempt of court for publications censuring judges is simply intolerable in a land of equality before the law where judges are no more important to the universe than executives and legislators." (*Op. cit.*, pp. 114–115.)

[2] *Cf.* Brooks Adams, *The Theory of Social Revolutions*, New York, 1913. This writer states the theory that when courts become political and legislate the people lose faith in them and may ignore or change them. This explains the Terror in France when the party in power took the judicial function into its own hands because it distrusted the courts. The courts have been

I have not the space to describe here all of the causes of rigidity in our social organization. There is reason to believe that the prevailing economic system presents much opposition to change. The capitalist class which is now predominant stands in the way of many changes which would be to the interest of the vast majority of human beings. As the masses become better educated and more self-conscious, they will become more restless and will resist more and more the domination of the capitalist class. Consequently, rigidity in the economic as well as in the political system is very likely to give rise to disorder and bloody strife. Furthermore, religion and archaic moral standards always stand in the way of change.

At the same time, we must not forget what I have already pointed out, namely, that at least a small amount of rigidity in our social system must always be retained for several reasons. In the first place, it is needed to conserve the achievements of the past. In the second place, it gives enough stability to the government to prevent frequent or continuous disorder. In the third place, it acts as a check upon foolish and ill-advized changes.

But rarely ever is there too little rigidity to accomplish the above-mentioned functions. Indeed, the tendency is almost invariably in the opposite direction. This is due to certain strongly marked traits of human nature. In the first place, it is due to the general conservative tendency of the human mind, owing largely to the mental inertia which dislikes and resists change. In the second place, it is due to the fact that for most persons symbols acquire an exaggerated importance, while the realities for which they once stood are lost sight of. Consequently, the majority of persons are constantly defending old objects which have acquired symbolic significance but which may no longer have any real value, while they oppose new objects which may have a genuine value.

and are political in this country, and as the representatives of a capitalist class which seems incapable of readjusting itself to changed conditions may precipitate a revolution.

As is well indicated by Adams, the French Revolution is an object lesson which should serve as a warning. If the rulers of France had been willing to yield, the Bloody Terror would not have taken place, and the Revolutionary tribunals could never have bathed the soil of France with the blood of thousands of political offenders, the victims of the guillotine.

So that these mental traits should be restrained rather than encouraged. The most valuable disciplinary measures can be applied during the rearing and education of the young. I cannot outline a complete system here. Suffice it to say that by removing as far as possible the formalistic element in the educational system the effects of these mental traits can be counteracted to a large extent. Among the reforms needed are the abolition of the training in formal courtesy and politeness in the home,[1] pedagogical methods in the schools which will stimulate the pupils to think for themselves, academic freedom in the colleges and universities, etc.

Evolutive Crime and Democracy

The discussion in this chapter reveals the significance of evolutive and political crimes in relation to social readjustment. It is evident that these crimes manifest the presence of serious problems of readjustment in any social system. But they are of peculiar significance in any democratic system, because in a democracy the rights and interests of the individuals who constitute the democracy are of paramount importance. That is why I have emphasized their significance in this country.

In any country the number of political crimes will depend in part upon the extent to which its government fails to win the loyal support of the inhabitants. If the government meets the ideals of the people, there will be few political crimes. If the government falls far short of these ideals, the number of these offenses will greatly increase. In this country the governmental system has attained to the political ideals of the people more nearly probably than in most countries. But even in this country it has failed in many important respects to fulfill the democratic ideals of its citizens. So that all of the movements towards a more thoroughgoing political democracy are of the utmost importance in this connection. Among these are the movements for making the federal constitution more amendable, for placing salutary restraints upon the power of the courts, for proportional representation, for the popular recall, for the initiative and

[1] It goes without saying that the training in genuine courtesy should be retained and strengthened. (The distinction between formal and genuine courtesy is pointed out in Chapter XIV.)

referendum, for universal suffrage, and many other movements which I cannot describe here.

For the same reasons are of importance the measures for greater freedom and equality in the forms of social organization outside of the political system, in matters of morals, and in the economic world. In fact, the movements towards an industrial democracy are perhaps of the most fundamental importance in this connection.[1]

[1] I have described briefly the movements towards political and industrial democracy in my *Poverty and Social Progress*. See especially Chapters XXVIII and XXIX entitled "Industrial Democracy" and "Political Reorganization and the Democratic State."

CHAPTER XXX

THE PREVENTION OF CRIME

Changes in the nature and extent of crime — The prevention of crime dependent upon the prevention of other social evils — Individual and social criminogenic factors — The normal life as a preventive of crime.

CRIME as a social phenomenon will continue to change as long as society changes. These changes will be both in the nature and extent of crime. New social conditions create new occasions for conflict between individual and social interests, while obsolete causes of conflict disappear with changing conditions. The increase or decrease of crime therefore depends upon the proportion between the new and the old causes of crime.

While civilization has destroyed many causes of crime, the advance of civilization has created some new occasions for conflict, and has therefore increased crime in some ways, though it is impossible to ascertain whether it has increased it on the whole. It is possible that civilization will continue to increase crime for a time. For example, the tremendous growth of cities in modern times has been a powerful factor for the increase of crime, and urban growth will doubtless continue for a time at least. The continual rise of moral standards will always be adding new forms of conduct to the list of crimes, though it will also be removing other forms of conduct hitherto stigmatized as criminal in the penal code.

The diminution of crime will depend somewhat upon the growth of population and the consequent bitterness of the struggle for existence. If population increases too rapidly, this struggle will be intensified, and there can be little hope of a decrease of crime. But if the growth of population is regulated, so that the population will not increase too rapidly, the conditions of human existence will be ameliorated, and crime will probably diminish. This fact indicates the supreme importance for the prevention of crime of the intelligent use of birth control

measures, which are now prohibited in many communities by stupid and brutal laws.[1]

Crime can never be entirely abolished. However ideal social conditions may become, certain human traits which give rise to anti-social acts can never be eradicated. Among these traits are selfishness, greed, anger, jealousy, vindictiveness, envy, etc.

It is nevertheless worth while to consider the problem of the prevention of crime. Economic and political reorganization will doubtless lessen crime in the long run. If a socialistic scheme of social organization proves successful, it will obviate many of the crimes against property. An increase in the efficiency of government will prevent some of the crimes against the person. But even if no thoroughgoing reorganization of society ever takes place, there will doubtless be a certain amount of improvement in economic and political conditions which will diminish crime somewhat. The egregious inefficiency of the existing economic and political system will be remedied in part, and will thus render more effective the methods of dealing with crime.

The prevention of crime is dependent almost entirely upon the prevention of other social evils, so that it is hardly possible to discuss it apart from those evils. For example, a program for the prevention of poverty involves a program for the prevention of many of the social evils which give rise to crime, because crime is closely bound up in its causation with poverty and its attendant evils. It is, therefore, impossible to devize a special program for the prevention of crime, and I shall merely point out how its prevention is related to the prevention of these other evils and to the reorganization of society in general.

In the chapter on the economic basis of crime I have shown how poverty and other evil features of the present economic organization of society give rise to crime. The instability of the existing economic organization is illustrated by the trade cycle which causes a vast amount of unemployment and violent fluctuations in prices and wages. In this fashion the fundamental material basis of existence of a large part of society is rendered uncertain, and a good deal of economic pressure to commit criminal acts is created. The excessive inequality in the distribution of wealth is reflected in the great disparity between the criminality of the poor and of the wealthy classes.

[1] See Chapter V.

This economic pressure also acts upon many persons who are not destitute, but who desire a higher standard of living. Many of the weaker individuals, and some of the stronger ones as well, yield to the temptation to commit criminal acts in order to attain their desires. All of these facts indicate that the prevention of crime does not depend upon special measures for the abolition of its specific causes, but upon a more or less thorough reorganization of the economic system.

At the same time our comprehensive survey of the causes of crime has indicated how essential it is in the study of the etiology of crime to keep in mind the individual factors, as well as the economic and other social factors. Many writers have committed the grave error of going to the one or to the other of these two extremes in formulating their theories. Among those who have laid excessive emphasis upon the economic factors are the socialists who have attributed most crimes to the economic organization of society, and have contended that under a socialist organization there would be very little crime. In similar fashion, the single taxers have blamed most crimes upon the present economic organization, and have asserted that the single tax would prevent most of them. Some of the anarchists have taken a similar view with respect to the present situation, but have contended that the abolition of all political organization would be the most effective preventive of crime. A number of sentimentalists without any definite program have attributed most crimes to economic factors because they have been unwilling to blame them upon the criminals themselves.

On the other hand, there have been many persons who have given excessive weight to the individual factors in the causation of crime. Among these have been some religious writers who have apparently wanted to emphasize the sinfulness and personal responsibility of criminals because they believe in the existence of a free will. But probably the majority of those who have taken this view have done so for conservative reasons, because they did not want to blame most crimes upon the existing order, which they want to preserve.

There have also been a few criminal anthropologists and psychiatrists who have become so obsessed with the pathological and abnormal traits of the criminal class that they have been able to see few of the factors outside of the individuals. They

have therefore given undue weight to the individual factors for crime.

Excessive emphasis upon the individual factors in criminality has led some persons to the belief that eugenic measures can prevent crime entirely or in large part. These measures may eliminate some of the feebleminded and psychopathic criminals. But it is obvious that it cannot remove the powerful criminogenic factors in the environment.

In the last analysis, it may be said that crime will disappear to the extent to which the normal life becomes possible for mankind. By the normal life I mean the spontaneous expression of human nature. In any organized society this spontaneity must be limited by at least a small amount of social control. But in the existing organization of society this spontaneity is limited far more than is necessary for social welfare.

The prevention of poverty and other economic evils, and the abolition of the restrictions imposed by institutionalized religion, conventional morality, and antiquated repressive laws, would increase greatly the scope of the normal life for human beings, and would obviate to a corresponding degree the occasions for anti-social conduct. So that the great forces of science and of statesmanship in our civilization should be directed towards attaining the highest goal of social progress which will render the normal life more feasible for all of mankind.

Hence it is that the problem of crime is a problem of human freedom as well as of repression. It is to a considerable extent a problem of liberating mankind from the bonds which fetter body and mind and which interfere with the development of a full and well-rounded human personality.

APPENDIX A

PRICES OF CEREALS AND CRIMES AGAINST PROPERTY

The charts on pages 72, 74, and 76, are plotted from the following tables:

ENGLAND AND WALES [1]

Years	*Price of Wheat (Quarter)* sh.	d.	*Crimes against Property without Violence to 100,000 of the Population*
1858	44	2	439
1859	43	10	399
1860	53	3	392
1861	55	4	415
1862	55	5	433
1863	44	9	392
1864	40	2	365
Average			405

FRANCE [2]

Years	*Average Price of a Hectolitre of Wheat* fr.	c.	*Number of Persons Convicted of Crimes against Property (to 1,000 of Population)*
1850	14	32	14.058
1851	14	48	14.678
1852	16	75	16.217
1853	22	39	16.652
1854	28	82	20.442
1855	29	32	19.223
1856	30	75	18.222
1857	24	37	17.218
1858	16	75	15.437
1859	16	75	14.655
1860	20	24	15.707
1861	24	55	16.518
1862	23	24	16.742
1863	19	78	15.309

[1] Rearranged and adapted from G. von Mayr, *Statistik der gerichtlichen Polizei im Konigreiche Bayern und in einigen anderen Ländern*, Munich, 1867; and W. A. Bonger, *Criminality and Economic Conditions*, Boston, 1916, pp. 43–44.

[2] A. Corne, *Essai sur la criminalité*, in the *Jour. des Economistes*, Jan., 1868, p. 81.

RUSSIA [1]

Years	*Convictions for Theft to 100,000 of the Population*	*Price of a "Pud" of Rye in Kopecks*	*Ratio of Cereal Crop to Average Crop of 25 Years (=100)*
1874	76	75	105
1875	77	73	90
1876	78	76	95
1877	86	80	103
1878	95	76	106
1879	90	86	93
1880	104	99	87
1881	103	129	105
Average *1874–81*	*89*	*87*	...
1884	45	90	108
1885	46	77	90
1886	44	74	100
1887	45	67	114
1888	43	65	108
1889	43	70	83
1890	46	68	97
1891	52	129	73
1892	52	89	87
1893	50	61	104
1894	50	50	121
Average *1884–94*	*47*	*76*	...

[1] E. Tarnowski, *La delinquenza e la vita sociale in Russia*, in the *Rivista Italiana di sociologia*, July, 1898, p. 497.

APPENDIX B

A BIOMETRIC STUDY OF THE ENGLISH CONVICT

In 1913 was published "The English Convict" by Charles Goring, Deputy Medical Officer of H. M. Prison, Parkhurst. This is a report of a statistical study of three thousand convicts in the English prisons. I shall give a brief summary of the conclusions of this report because of the light they throw upon the traits of the criminal.

Before beginning this summary I shall refer to one feature of Dr. Goring's report which mars it throughout. The first section is entitled "The Superstition of Criminology." It appears that this superstition is, according to Dr. Goring, a belief in a distinct criminal type. He thinks that this belief has been widespread among criminologists up to the present day, and that Lombroso is largely responsible for this belief. In order, therefore, to indicate the nature of this alleged belief, he attempts to state Lombroso's theory as he understands it.

He asserts that Lombroso's theory "is to the effect that the criminal, as found in prison, is a definite, anomalous, human type: that is to say, he is a specific product of anomalous biological conditions. . . . Atavistic, insane, savage, degenerate, all or any of these things, whatever they may mean, the criminal may be; one thing the criminologists will not let him be: he is not, he never is, say the Lombrosians, a perfectly normal human being, responsible for his own actions. No matter what is the nature of the defect — and even amongst Lombroso's immediate disciples there has been much divergence of opinion in this respect — the essential fact upon which all are agreed is that the mind of the criminal is defective in some way; that the criminal is either mentally diseased, or so mentally anomalous that he ought not to be judged by the ordinary standards of morality. And this doctrine, they declare, flows naturally from the facts of criminal anthropology, *i. e.*, from the facts which have been elicited by direct observation of criminals as found in prisons." (P. 13.) "The preconceived, and, in our opinion, totally unfounded, Lombrosian notion, was that criminality is a specific condition of mind or soul: is a definite state of psychical instability. And this psychical state, with its outward and physical signs of an inward and spiritual darkness, this mental and moral instability, underlay, according to the above supposition, any and every form of lawlessness, and potentiality for crime; and was its only explanation, and its sole promotor." (P. 15.)

To any one familiar with Lombroso's theory it is apparent that Dr. Goring is grossly and inexcusably misrepresenting him. Lombroso never asserted that the criminal in prison always belongs to a "definite, anomalous, human type," and the "Lombrosians" never assert that the criminal is never a "perfectly normal human being." On the contrary, towards the end of his career Lombroso did not believe that more than forty per cent of the criminals belonged to the type he called the "born criminal," while all of the "Lombrosians" believe that circumstances lead many normal individuals to commit crime. Whatever his mistakes may have been, Lombroso never took this extreme view. And yet Dr. Goring, laboring under this unpardonable delusion, takes occasion at numerous points throughout his report to criticize Lombroso severely for this grotesque theory which he attributes to him.

In passing I should, in self-defense, take note of a gross misrepresentation of me of which Dr. Goring has also been guilty. Speaking of books written by Tarnowsky,[1] Ferrero,[2] and myself,[3] he says:— "During the past year, three books of scientific pretensions have been published; one dedicated to Lombroso himself; all three devoted to the propagation of his discoveries and creed." (P. 19.) The implication of this statement seems to be that I wrote my book as a follower and disciple of Lombroso. It is true that I endeavored in that book, and also more briefly in another writing,[4] to give a sympathetic exposition of Lombroso's work and ideas. But at no point in any one of my writings have I given justification for the notion that I am a disciple of Lombroso. On the contrary, most of my book referred to by Goring is devoted to the propagation of ideas which did not originate with Lombroso, and I have criticized the Lombrosian theory at many points. As an illustration I will quote one passage which includes both criticism and appreciation. "More than any other man he has stimulated the development of the new science of criminology. His original and versatile genius and aggressive personality have led in this great movement towards the application of the positive method to the problem of crime. As a pioneer in the anthropological study of the criminal he was bound to make mistakes, and his impetuous temperament, leading him sometimes to generalizations drawn too hastily, has tended to increase the number of these mistakes. On account of these mistakes as well as because he has been a pioneer,

[1] *Les femmes homicides.*

[2] *Criminal Men.*

[3] *The Principles of Anthropology and Sociology in Their Relations to Criminal Procedure*, New York, 1908.

[4] *Introduction* to Lombroso's *Crime, Its Causes and its Remedies*, Boston, 1911.

he has suffered a great deal of criticism." [1] This passage was written before Lombroso's death.

Goring has great faith in the statistical method, and rejects all other methods in his investigation. His first inquiry is as to the "alleged existence of a 'physical criminal type.'" This is, of course, directed towards overthrowing the Lombrosian theory of the born criminal. He has the measurements of thirty-seven characters of his convicts, including the dimensions of the head and face, the relations of various parts of the body to each other, etc. These measurements he has correlated with the crimes these convicts have committed. "It will be seen that ten only of the thirty-seven characters have correlations with nature of crime greater than .1, and that the correlations of the remaining twenty-seven are either insignificant, relatively to their probable errors, or so small in value as to be legitimately ignored in such limited samples as those we have been examining. Of the ten above .1 in value, three only are above .2, and only one above .3 in value. With the exception of these ten, which will require more detailed investigation, we may say that these physical characters have no significant association with the nature of the crime committed." (P. 129.) After making a comparison between criminals as a class and the non-criminal public, he states his final conclusion; — "From these comparisons, *no evidence has emerged confirming the existence of a physical criminal type, such as Lombroso and his disciples have described.*" (P. 173.)

Goring describes in the next place the physique of his criminals. He has measurements and records of height, weight, span of arms, general health, physical constitution, muscularity, etc. He concludes that his convicts are inferior in stature and weight, and that there are certain physical differences between different types of criminals. "From the above recorded differences in relation to their probable errors, we see that in all three characters, violence and sexual offenders stand out from others — the former in being more healthy, more muscular and stouter than criminals generally, and the latter by their lack of differentiation in these respects. On the other hand, incendiaries and thieves are similarly less healthy, less muscular, and less stout than criminals generally; and fraudulent offenders also are deficient in health and muscularity. Starting with violence, there is a progressive falling off in health and strength, and, with one exception, a progressively increasing degree of emaciation as we pass through rape, fraud, arson and stealing." (P. 186.) His final conclusion is that "all English criminals, with the exception of those technically convicted of fraud, are markedly differentiated from the general

[1] *The Principles of Anthropology and Sociology in Their Relations to Criminal Procedure*, p. 24.

population in stature and body-weight; in addition, offenders convicted of violence to the person are characterised by an average degree of strength and of constitutional soundness considerably above the average of other criminals, and of the law-abiding community; finally, thieves and burglars (who constitute, it must be borne in mind, 90 per cent of all criminals), and also incendiaries, as well as being inferior in stature and weight, are also, relatively to other criminals and the population at large, puny in their general bodily habit." (P. 200.)

He next studies age as an etiological factor in crime. He finds among his convicts a tendency to begin their criminal careers early in life, which leads him to the tentative conclusion that "the majority of habituals are first convicted during adolescence because a relative predisposition to transgress, or, it may be, a relative incapacity to keep, the law, like most human predispositions, tends to become manifest at the earliest opportunity. . . . Assuming, then, the existence of variability in criminal proclivity — assuming the existence of social or anti-social predispositions, variable amongst individuals, but possessed to some degree by all people, it should not be surprising that more than a half of habitual criminals give evidence of their own peculiar anti-social proclivities before the age of 25." (P. 212.) This statement foreshadows his later conclusion with regard to the extent to which crime is determined by a predisposition to crime in the criminal.

Then he takes up the criminal's vital statistics with regard to health, disease, mortality, and enumeration. He finds that with respect to health in general and most diseases, including insanity, the convict compares favorably with the population at large. "In the main, this exhaustive inquiry indicates that there is no relation between a healthy or delicate constitution *per se* and the committing of crime; and that the coefficient of correlation between these conditions is .07: a value which shows that, if anything, the criminal is healthier on the whole than is the law-abiding subject." (P. 228.) But he finds three pathological conditions prevalent among his criminals, namely, epilepsy, alcoholism, and what he calls sexual profligacy, by which he means venereal disease. "The mortality statistics confirm the prevailing belief that epilepsy conduces to the committing of crime; and the intensity of this influence, measured on the correlation scale, is given by the fraction .26. The important part played by alcoholism in the committing of crime is illustrated by the relatively high value of the correlation coefficient of criminality with alcoholism, .39, and by the increased mortality and prevalency amongst prisoners, relatively to the general population, of diseases associated with this condition. Similarly, the relation between sexual profligacy and crime is statistically demonstrated by the value of the correlation coefficient

between criminality and syphilis, .31, and also by the increased prison mortality and prevalency of all diseases to which some form of venereal disease is antecedent." (P. 229.)

With regard to the mortality of the criminal he concludes that "the presumptive evidence is that the death-rate of criminals approximates closely to that of the general population." (P. 233.) Then by means of a complicated statistical calculation he estimates that the total population of male offenders, both prior and subsequent to conviction, in England and Wales, is 3,110,500. Of these 1,115,490 are prior to conviction, or eventual offenders; and 1,995,010 are subsequent to convictions, or manifest offenders. (P. 234.)

Goring now turns to the mental traits of the criminal. It is obvious that mental traits cannot be measured directly, so that he depends in most cases upon personal estimations of them made by observers of the individual criminals. First he studies a number of mental traits under the following heads: —

1. *Temperament.* Here he classifies the degree of suspiciousness of the criminal under the categories of suspicious, trustful and medium; the sanguine as opposed to the phlegmatic temperament; the contented as opposed to the discontented frames of mind; and the degree of egotism under the categories of egotistic, sympathetic, and betwixt. (P. 238.)

2. *Temper*, under the categories of good or amiable or serene temper, as opposed to bad temper, under which are hot and violent forms and sullen and violent forms. (P. 238.)

3. *Facility*, under which "convicts are classified within the three categories of facile, obstinate, and medium, according to their tendency to respond or to be resistant to the influence of other personalities and of circumstances." (P. 239.)

4. *Conduct*, "graduated by the average number of reports for bad behavior during one year's sojourn in prison." (P. 239.)

5. *Suicidal tendency*, "estimated from the recorded facts of attempts to commit suicide." (P. 239.)

6. *Insane diathesis*, "measured by the fact that a convict has, or has not, been in an asylum at some time of his life." (P. 239.)

After working out the necessary correlations he arrives at the following conclusion with respect to temperament: — "The only correlation whose value has any significance is the one measuring the relation between egotism and crime, (crude correlation ratio .23). Referring to the means of egotism within the several groups, we see that the value of this coefficient measures the extent to which fraudulent and sexual offenders tend, on the average, to be more egotistic than those committing other types of crime. For the rest, we conclude that there is no relation between the temperament of criminals and the

kind of crime they commit. We see, however, that criminals are highly differentiated in general intelligence; and also that the more feeble their intelligence may be, the more marked becomes the average degree of melancholic tendency, of discontentment, and especially of suspiciousness, displayed by criminals." (P. 241.)

With respect to temper, facility and conduct he says that "in conjunction with the other evidence produced, we conclude that criminals convicted of violent crimes are distinguished by hot and uncontrolled tempers, and by obstinacy of purpose, but that other differences of temper, will, and conduct, amongst convicts, depend entirely upon the grade of their general intelligence." (P. 244.)

With respect to suicide and insanity he says that "criminals convicted of violence crimes, as well as being distinguished by hot and uncontrolled temper, and by obstinacy of will, are also differentiated from other types of convicts by increased suicidal tendency, and by an augmented proclivity to be eventually certified insane; but that in other respects — excluding a slightly increased degree of egotism displayed by offenders technically convicted of fraud — differences of temperament, temper, will, conduct, suicidal tendency, and insane proclivity, amongst convicts, depend entirely upon their differentiation in general intelligence." (P. 245.)

Because he believed that differences in these mental traits depend largely upon differences in intelligence, he studied the differences in the mental capacity of his criminals. After making an elaborate calculation of the amount of mental defectiveness in the general population and among criminals he says that "against the .45 per cent. of defectives in the general population, the proportion of mentally defective criminals cannot be less than 10 per cent., and is probably not greater than 20 per cent." (P. 255.) Assuming that the convicted felons form 1.29 per cent of the general population he calculates a coefficient of correlation between these convicts and mental defectiveness of .63. "It is clear that the relationship between mental defectiveness and the committing of all types of crime, with the exception of some kinds of fraud, is an extremely intimate one. The strength of this bond transcends that of any we have hitherto been able to discover: and it is evident that defective intelligence is one of the primal sources of crime in this country." (P. 260.)

With respect to the relation of this mental defectiveness to the other constitutional determinants of crime, he says that "defective physique, extreme forms of alcoholism, epilepsy, insanity, sexual profligacy, and weak-mindedness — these are the constitutional conditions, and the only ones, which so far have emerged as significantly associated with the committing of crime in this country." (P. 262.) His final conclusion is as follows: — "Our final conclusion

is that English criminals are selected by a physical condition, and a mental constitution which are independent of each other — that the one significant physical association with criminality is a generally defective physique; and that the one vital mental constitutional factor in the etiology of crime is defective intelligence." (P. 263.)

Next he takes up the influence of the "force of circumstances" upon the genesis of crime. Here he examines the following conditions: — nationality; education; employment; alcoholism; influence of family life, including the standard of living of parents, the age of the subjects at the death of their mothers, the order of the subject in his family, and the number in the family of the subject; and the relation of the first to subsequent convictions of convicts, including the age of the subject at first conviction, and the nature of the subject's first sentence.

It would be impossible to summarize here his lengthy analysis of these factors and their degree of correlation with crime, which he finds to be very small. His final conclusion is as follows: — "From the general trend of the results tabulated above, our interim conclusion is that, relatively to its origin in the constitution of the malefactor, and especially in his mentally defective constitution, crime in this country is only to a trifling extent (if to any) the product of social inequality, of adverse environment, or of other manifestations of what may be comprehensively termed 'the force of circumstances.'" (P. 288.) However, this conclusion is only tentative. "Very superficially and imperfectly we have, in this chapter, touched upon a subject of the greatest importance criminologically; our conclusions have no pretensions to finality: our hope is that they may lead to a more thorough and representative statistical examination of a question so urgently awaiting solution." (P. 289.)

After an elaborate investigation of the fertility of criminals he comes to the conclusions that the absolute fertility of criminals to the absolute fertility of the general community is as 550,653 to 877,852 (P. 296); that criminals are a product of the most prolific stocks in the community; and that habitual criminals are less than half as fertile as other criminals, but that this is not due to physiological sterility but to the desertion of habitual criminals by their wives.

The last thing he investigates is the influence of heredity upon the genesis of crime. The result of this investigation is that "the family incidence of crime is not fortuitously distributed, is not entirely independent of lineage; that criminals do not occur equally in *all* families of the general community, but tend to be restricted to *particular stocks* or sections of the community: to those stocks tainted with criminal ancestry. And we have found that the intensity of this limitation, the intensity of this parental resemblance in criminal

propensity, ranges between .45 and .6." (P. 364.) Comparing this conclusion with regard to heredity with the previous conclusions with regard to defective physique, mental defectiveness, and the influence of environmental conditions, he states two general conclusions; — "The one is that the criminal diathesis, revealed by the tendency to be convicted and imprisoned for crime, is inherited at much the same rate as are other physical and mental qualities and pathological conditions in man. The second is that the influence of parental contagion, although varying somewhat in intensity in different conditions, is, on the whole, inconsiderable, relatively to the influence of inheritance, and of mental defectiveness: which are by far the most significant factors we have been able to discover in the etiology of crime." (P. 368.)

It would be easy to criticize severely Goring's methods and conclusions in various respects. For example, he carries the statistical method too far in his attempt to measure all of the traits of the criminal by means of it, inasmuch as many traits, such as most of the mental traits, cannot be studied by a quantitative method. His classification of the mental traits of criminals studied by him is very crude and betokens an ignorance of psychology on his part. He does not appear to have given enough weight to the fact that the criminals studied by him, as convicts incarcerated in a prison, necessarily formed a selected group of criminals. But I have not the space for extended criticism, and, in any case, this has already been done at great length by others of his critics.[1]

With regard to the main object of his report, namely, his polemical attack upon Lombroso, (which is out of place in any scientific treatise), it is obvious from the brief citations which I have presented that his conclusions are almost entirely self-contradictory. While he has furnished some facts to disprove the existence of an anthropological criminal type, (which, indeed, needs no disproof), he has proved himself more Lombrosian than Lombroso himself in his emphasis upon the hereditary factors for criminality in the form of a "criminal diathesis," and in his unwarranted depreciation of the influence of the "force of circumstances" or environment as a cause of crime.

[1] For example, see a symposium upon Goring's report in two numbers of Volume V of the *Jour. of the Am. Institute of Crim. Law and Criminology*, (July and Sept., 1914), including the following articles: Gina Lombroso-Ferrero, *The Results of an Official Investigation in England*, pp. 207–223; E. Ferri, *The Present Movement in Criminal Anthropology*, pp. 224–227; S. de Sanctis, *An Investigation of English Convicts and Criminal Anthropology*, pp. 228–240; W. A. White, *Method and Motive from the Psychiatric Viewpoint*, pp. 348–352; H. D. Newkirk, *The Sociologic Problem*, pp. 353–357; P. E. Bowers, *Criminal Anthropology*, pp. 358–363.

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Jour. Crim. Law = *Journal of the American Institute of Criminal Law and Criminology.*

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